(31)

No. 00-596-CFX Title: Lorillard Tobacco Company, et al., Petitioners
v.
Thomas F. Reilly, Attorney General of Massachusetts, et al.

Docketed:
October 17, 2000 Court: United States Court of Appeals for the First Circuit

Vide:
00-597

Entry	Date	Proceedings and Orders
	Oct 16 2000	Petition for writ of certiorari filed. (Response due November 16, 2000)
	Nov 16 2000	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
	Nov 16 2000	Brief of respondent Thomas Reilly, Attorney General of Massachusetts in opposition filed. VIDED.
	Nov 29 2000	DISTRIBUTED for Conference of January 5, 2001
	Nov 30 2000	Reply brief of petitioners Lorillard Tobacco Company filed.
	Jan 8 2001	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Jan 8 2001	Petition GRANTED. The case is consolidated with No. 00-597, Altadis U.S.A. Inc.a v. Reilly, Attorney General of Massachusetts, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT April 25, 2001. **********
	Feb 22 2001	Joint appendix filed. VIDED.
	Feb 22 2001	Brief of petitioners Lorillard Tobacco Company, et al. filed.
	Feb 22 2001	Brief of petitioner U.S. Smokeless Tobacco Company filed. VIDED.
	Feb 22 2001	Brief amici curiae of American Association of Advertising Agencies, et al. filed. VIDED.
	Feb 22 2001	Brief amicus curiae of Association of National Advertisers, Inc. filed. VIDED.
	Feb 22 2001	Brief amicus curiae of Product Liability Advisory Council, Inc. filed. VIDED.
	Feb 22 2001	Brief amici curiae of Newspaper Association of America, et al. filed. VIDED.
	Feb 22 2001	Brief amicus curiae of Washington Legal Foundation filed. VIDED.
	Feb 22 2001	Brief amici curiae of Infinity Outdoor, Inc. and Vista Media Group, Inc. filed. VIDED.
	Feb 22 2001	Brief amicus curiae of National Association of Convenience Stores filed.
	Feb 22 2001	LODGING consisting of twenty bound copies of related material submitted by counsel for Natl. Assn. of Convenience Stores.
	Feb 22 2001	Brief amici curiae of American Advertising Federation, et al. filed. VIDED.
	Mar 1 2001	Record filed.
	Mar 9 2001	CIRCULATED.
	Mar 22 2001	Record filed.

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No. 00-596-CFX

Entry	Date	Proceedings and Orders
	Mar 23 2001	Brief amici curiae of State's Attorney of DuPage County, et al. filed. VIDED.
	Mar 23 2001	Brief amici curiae of National Center for Tobacco-Free Kids, et al. filed.
	Mar 26 2001	Brief amicus curiae of Tobacco Control Resource Center, Inc. filed. VIDED.
	Mar 26 2001	Brief amici curiae of Cities of Oakland, California, and Chicago, Illinois filed. VIDED.
	Mar 26 2001	Brief amici curiae of National Conference of State Legislatures, et al. filed. VIDED.
	Mar 26 2001	Brief of respondent Thomas F. Reilly, Attorney General of Massachusetts filed. VIDED.
	Mar 26 2001	LODGING consisting of twenty copies of excerpts from Reducing Tobacco Use, Report of the Surgeon General (2000)and one copy of the original report received from counsel for the respondent and distributed. VIDED.
	Mar 26 2001	Brief amici curiae of American Medical Association, et al. filed.
	Mar 26 2001	Brief amici curiae of California, et al. filed. VIDED.
	Mar 26 2001	Brief amicus curiae of American Planning Association filed. VIDED.
	Mar 26 2001	Brief amicus curiae of American Legacy Foundation filed. VIDED.
	Mar 26 2001	Brief amici curiae of City of Los Angeles, et al. filed.
	Mar 26 2001	LODGING consisting of twenty bound copies of five documents received from counsel for City of LA, et al. and distributed.
	Mar 26 2001	Brief amicus curiae of United States filed. VIDED.
	Mar 26 2001	Brief amici curiae of City of New York, et al. filed.
	Mar 27 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 30 2001	Motion of the Solicitor General for leave to participate inoral argument as amicus curiae and for divided argument DISTRIBUTED.
	Apr 2 2001	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 18 2001	Reply brief of petitioner United States Smokeless Tobacco Company filed. VIDED.
	Apr 18 2001	Reply brief of petitioners Lorillard Tobacco Company, et al. filed.
	Apr 18 2001	LODGING consisting of twenty bound copies of related documents submitted by counsel for Lorillard Tobacco, et al.,received and distributed.
	Apr 25 2001	ARGUED.

Supreme Court, U.S.
FILED
OCT 16 2000
OFFICE OF THE CLERK

No. 00-596

In the Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; AND UNITED STATES TOBACCO COMPANY,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Massachusetts regulations that sharply limit the public display of cigarette advertisements do *not* impose prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts' prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

PARTIES TO THE PROCEEDINGS

The petitioners are Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and United States Tobacco Company. The respondent is Thomas F. Reilly, the Attorney General of Massachusetts. A separate petition for certiorari has been filed by Altadis U.S.A. Inc. (as successor to Consolidated Cigar Corporation and Havatampa, Inc.); General Cigar Co., Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; and Tobacco Exporters International (USA) Ltd., who were also parties to the consolidated appeals below.

RULE 29.6 STATEMENT

Petitioner Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Petitioner R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.)

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Petitioner Brown & Williamson Tobacco Corporation has the following parent corporations:

B•A•T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Petitioner Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Petitioner United States Tobacco Company has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of United States Tobacco Company's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the consolidated appeals below.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 218 F.3d 30. The district court's memorandum and order disposing of petitioners' preemption claims on summary judgment (App., *infra*, 46a-60a) is reported at 76 F. Supp. 2d 124. The district court's memorandum and order resolving petitioners' First Amendment claims on summary judgment, and disposing of the remainder of the case (App., *infra*, 61a-104a), is reported at 84 F. Supp. 2d 180.

JURISDICTION

The court of appeals entered its judgment on July 17, 2000. App., *infra*, 1a-45a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The challenged regulations of the Massachusetts Attorney General, which are codified at 940 C.M.R. 21.00 and 22.00, are set out at App., *infra*, 105a-126a. The statute under which these regulations were promulgated, Mass. Gen. Laws ch. 93A, § 2, is set out at App., *infra*, 127a.

Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1334, provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

In recent years, numerous states and local jurisdictions throughout the nation have enacted diverse and increasingly severe limitations on the public display of tobacco advertisements. *See* App., *infra*, 128a-134a. Like the Massachusetts regulations at issue in this case, many of these restrictions prohibit virtually *all* outdoor advertising (including indoor advertising that is visible from the street) within a broadly defined distance of any "park," "playground," or "school." As in this case, the resulting geographical sweep of these prohibitions often covers as much as 90% of the populated area in the jurisdiction. And again like the regulations in this case, many of these regulations impose further substantial restrictions on the display of tobacco advertising *inside* retail establishments. The purpose of all these restrictions is unabashedly censorial: as the Attorney General of Massachusetts candidly conceded below, the regulations are based on the premise that, for the putative purpose of preventing children from being exposed to "positive" images of tobacco products that involve health risks, any tobacco advertising aimed at adults must be banned from virtually all public areas.

Over the last several years, a wide range of retailers, manufacturers, and advertisers have filed suits challenging the validity, under federal law, of these state and local restrictions. As a result of this litigation, a clear conflict has emerged among the

federal circuits as to whether these sorts of regulations are preempted by the Federal Cigarette Labeling and Advertising Act. Addressing a set of regulations virtually identical to those at issue in this case, the Ninth Circuit held that they were expressly preempted by the Act. By contrast, the Second, Fourth, and Seventh Circuits have all upheld comparable restrictions on tobacco advertising. In this case, the First Circuit expressly adopted the reasoning of the Second and Seventh Circuits, and explicitly rejected the Ninth Circuit's decision. App., *infra*, 9a-13a & n.7. The resulting disarray among the lower federal courts cries out for this Court's prompt review.

The First Circuit's ruling in this case also raises an important and recurring question concerning the reach of this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). In the last decade alone, six Justices, including five members of the current Court, have questioned whether the scope of *Central Hudson*'s application, if not the test itself, should be reassessed. Just over a year ago, the Court once again reserved the question whether there are some types of governmental restrictions on commercial speech that should be evaluated under a more stringent test than *Central Hudson*. Because this question was cleanly presented below, and because the decisions below amply illustrate the inadequacy of *Central Hudson* in the context of a broadly based ban on a specific category of truthful and nonmisleading commercial speech, this case presents an ideal vehicle for resolving this important and recurring First Amendment issue.

1. In May 1998, the Attorney General of Massachusetts proposed the sweeping regulations on tobacco advertising that are challenged in this case. C.A. Joint Consolidated Appendix (JCA) 628. In November 1998, while the proposed regulations were still pending for public notice and comment, the Attorney Generals of 46 States (including Massachusetts) settled certain lawsuits against the four major cigarette manufacturers[1] by

[1] The four manufacturers are petitioners Lorillard Tobacco Company,

entering into a "Master Settlement Agreement" (MSA). *See* JCA 3322. In addition to agreeing to pay the States more than $200 billion over 25 years, the four manufacturers who signed the MSA voluntarily agreed to substantial restrictions on their outdoor advertising, including a prohibition on the use of billboards, a ban on the use of signs in arenas, stadiums, shopping malls, or video arcades, and a ban on any advertising outside retail stores that is larger than 14 square feet. JCA 3218, 3322, 3341, 3353-55. The MSA expressly excluded from these voluntary restrictions, *inter alia*, any advertising outside retail stores that is *less* than 14 square feet. *Id.*[2]

Despite having obtained the cigarette manufacturers' agreement to the MSA's substantial limitations on advertising, the Massachusetts Attorney General went forward with the previously proposed tobacco regulations, which were formally promulgated on January 22, 1999. Although the MSA and its accompanying consent decree also contain an explicit prohibition on any advertising that directly or indirectly targets minors, JCA 516, 3349-50, the Attorney General asserted that the proposed regulations' further severe restrictions on advertising were necessary to protect minors from the health risks of tobacco products. JCA 387-89. These regulations prohibit virtually all outdoor advertising of tobacco and sharply limit indoor advertising as well. As described by the Attorney General, the theory of the regulations is that, in order to prevent minors from being influenced by tobacco advertisements targeted at adults, *all* tobacco advertising must effectively be eliminated from public areas where it might be seen by children. JCA 540-41, 3214.[3]

Brown & Williamson Tobacco Corporation, R.J. Reynolds Tobacco Company, and Philip Morris Incorporated.

[2] Petitioner United States Tobacco Company, which makes smokeless tobacco products, agreed to virtually identical restrictions on outdoor advertising in the Smokeless Tobacco Master Settlement Agreement (STMSA). Forty-five states executed the STMSA, but Massachusetts was not a signatory.

[3] In issuing the regulations, the Attorney General relied upon his authority

Three provisions of these regulations are challenged in this Court.[4] First, 940 C.M.R. 21.04(5)(a) effectively eliminates the use of outdoor advertising to provide truthful brand, availability, price, and other information to adult consumers of tobacco products in Massachusetts. Specifically, § 21.04(5)(a) expressly prohibits manufacturers, distributors, and retailers of tobacco products from using any "[o]utdoor advertising" of cigarettes and smokeless tobacco products in "any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." App., *infra*, 111a. Another provision of the regulations uses virtually identical language to impose these same restrictions on cigar advertising. 940 C.M.R. 22.06(5), App., *infra*, 123a.

The number of locations that trigger the 1,000 foot zone is so extensive that the resulting area covered by these regulations includes virtually the entire populated area of Massachusetts. Indeed, a detailed geographical analysis of the State's three largest cities revealed that between 87 and 91% of the land area of those cities was covered by § 21.04(5)(a)'s flat prohibition on outdoor advertising. JCA 3306-16. The severity of this

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to declare certain practices to be *per se* an "unfair and deceptive act or practice" under Mass. Gen. Laws ch. 93A, § 2. App., *infra*, 127a. It is undisputed, however, that the regulations do *not* require any showing of falsity; indeed, at least for purposes of summary judgment, the Attorney General was willing to assume "that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." *Id.* at 17a.

[4] In the proceedings below, several petitioners also challenged certain provisions of 940 C.M.R. 21.04(1) that prohibited various promotional practices in a manner that went above and beyond the restrictions included within the MSA. The scope of several of these provisions, however, was modified by certain regulatory amendments that were proposed while this action was pending in the district court. Although a copy of these amendments was submitted to the district court, the validity of the modified version of § 21.04(1) was not squarely presented to the lower courts and was, in any event, never specifically mentioned by the court of appeals. Petitioners reserve the right to challenge these amended provisions at a future date, but their validity is not before this Court at this time.

prohibition on "outdoor advertising" is further magnified by the fact that that term is defined to include not only advertising that is actually "outside," but also any advertising that is "within a retail establishment that is directed toward or visible from the outside of the establishment." 940 C.M.R. 21.04(5)(a), App., *infra*, 111a. The term "advertising," in turn, is sweepingly defined to include "any oral, written, graphic or pictorial statement or representation * * * the purpose or effect of which is to promote the use or sale" of cigarettes or smokeless tobacco products. *Id.*, § 21.03, App., *infra*, 107a.[5]

Second, 940 C.M.R. 21.04(5)(b) provides that, *inside* any retail establishment that is accessible to minors and that is within the same 1,000-foot zone, no portion of any advertisement of cigarettes or smokeless tobacco may be "placed lower than five feet from the floor." App., *infra*, 111a. Again, another section of the regulations uses virtually identical language in imposing the same restrictions on cigar advertising in Massachusetts. 940 C.M.R. 22.06(5)(b), App., *infra*, 123a.

Third, 940 C.M.R. 21.04(2)(c) and (d) severely restrict the visible display of tobacco products in retail outlets by requiring that cigarettes and smokeless tobacco be placed "out of the reach of all consumers, and in a location accessible only to outlet personnel." App., *infra*, 109a. Subsections 22.06(2)(c) and (d) of the same regulations impose identical restrictions on the display of cigar products. App., *infra*, 121a.

2. In May 1999, petitioners filed separate federal actions

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[5] The prohibition set forth in § 21.04(5)(a) was subject to one exception: a retailer could place a single sign, no more than four feet square and containing only black text on a white background, stating "Tobacco Products Sold Here." 940 C.M.R. 21.04(6), App., *infra*, 111a. Ironically, this was the only provision of the regulations that the district court invalidated on preemption grounds, and the Attorney General did not cross-appeal this aspect of the decision. App., *infra*, 6a & n.2. Thus, in its current form, § 21.04(5)(a) imposes a flat ban – throughout virtually all of Massachusetts – on any outdoor advertising of cigarettes or smokeless tobacco and on any indoor advertising that is visible from the street.

for declaratory and injunctive relief challenging various aspects of the regulations. A similar lawsuit was also filed by eight cigar companies, and all of the actions were ultimately consolidated. The district court had jurisdiction over these actions pursuant to 28 U.S.C. §§ 1331 and 1343. The cigarette companies alleged, *inter alia*, that several of the regulations were preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. § 1334(b), which provides that States shall not impose any "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion" of cigarettes.[6] Petitioners also alleged that certain provisions of the regulations violated the First Amendment.

On December 2, 1999, the district court granted partial summary judgment to the Attorney General, holding that § 5(b) of the FCLAA did not preempt either the outdoor advertising prohibition (§ 21.04(5)(a)) or the ban on indoor advertisements that were less than five feet from the floor (§ 21.04(5)(b)). App., *infra*, 59a-60a. The court relied on the "purpose" and legislative history of the statute to conclude that, notwithstanding the breadth of the statute's plain language, "*location*-based restrictions [on advertising] are not preempted by the Act." App., *infra*, 56a (emphasis added). Because § 21.04(5) outlawed tobacco advertising only if it was placed "outdoor[s]" or at "ground-level," the court held that it was a location restriction that was not preempted. *Id.*

Shortly thereafter, the district court issued a second order granting summary judgment to the Attorney General on all but one of the First Amendment claims. The court rejected petitioners' threshold contention that, because the regulations effectively suppressed all tobacco advertising in public areas, a

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[6] Petitioner United States Tobacco Company also raised a preemption claim, contending that because cigarettes and smokeless tobacco were addressed together in a single set of provisions, the regulations' coverage of smokeless tobacco could not be severed from the preempted cigarette regulations. App., *infra*, 6a n.3.

heightened standard of scrutiny should apply. App., *infra*, 67a. Because cigarette advertising was, in the district court's view, "functional pornography" that promoted a product with "no readily discernable social or health benefits," there was "no compelling reason to apply a heightened standard." *Id.* at 61a, 68a. Applying the four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the court upheld the outdoor advertising restrictions in § 21.04(5)(a), but concluded that the Attorney General had wholly failed to support the indoor advertising limitations in § 21.04(5)(b). App., *infra*, 82a-83a.

3. The court of appeals affirmed in part and reversed in part, thereby upholding in their entireties the advertising and display regulations relevant here. App., *infra*, 45a. With respect to the preemption claims, the First Circuit noted that there was a split of authority among the federal courts of appeals as to whether the FCLAA preempts advertising restrictions virtually identical to those contained in § 21.04(5). Declining to adopt what it termed a "hyper-literal" reading of the statutory phrase "with respect to the advertising or promotion of cigarettes," the court of appeals instead endorsed the Second Circuit's view that the sorts of restrictions on tobacco advertising at issue here do "'not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).'" App., *infra*, 10a (quoting *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 109 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1671 (2000)). Relying instead upon its view of Congress' underlying "purposes" in enacting the FCLAA, the court of appeals agreed with the Second and Seventh Circuits that, in light of the States' traditional power to prescribe local zoning restrictions on the placement of advertisements, Massachusetts' regulations were "location restrictions" that did not "present the kind of 'diverse, nonuniform, and confusing' advertising standards with which Congress was concerned when it enacted the FCLAA." App., *infra*, 13a & n.7 (quoting 15 U.S.C. § 1331) (citing *Giuliani*, 195 F.3d at 106-07, and *Federation of Adver. Indus. Representatives, Inc. v. Chicago*, 189 F.3d 633 (7th Cir. 1999),

cert. denied, 120 S. Ct. 1671 (2000) (*FAIR*)). For these reasons, the First Circuit expressly rejected the Ninth Circuit's view that "'[t]here is no good reason to believe that Congress meant less than what it said' in the phrase 'with respect to advertising.'" *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1073 (9th Cir. 1999), *amended*, 203 F.3d 1150 (9th Cir. 2000) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992)). *See* App., *infra*, 13a n.7.

The court of appeals also rejected petitioners' contention that the advertising and display restrictions violated the First Amendment. App., *infra*, 14a. In determining what level of scrutiny to apply, the court expressly agreed with petitioners that the regulations were "plainly content-based." As the court observed, "[a]dvertising of other products [than tobacco] is not restricted by the regulations, nor is tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns." *Id.* Despite acknowledging "recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification" in such cases, the court of appeals nonetheless concluded that it was "bound to apply the *Central Hudson* test, as is, to this case." App., *infra*, 16a.

Applying *Central Hudson*, the court of appeals noted that, for purposes of summary judgment, the Attorney General had conceded *arguendo* that "the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." App., *infra*, 17a. The court also concluded that the State's interest in reducing tobacco consumption by minors was "substantial." *Id.* In evaluating whether the Attorney General had demonstrated that the proposed regulations would "directly advance" that interest, the court held that it was sufficient for respondent to rely upon the "'common-sense' argument that advertising has some cause-effect relationship with consumption" and to submit (without any supporting expert testimony) a collection of studies and articles culled from governmental reports and various publications. *Id.* at 26a.

As to the fourth and final prong of the *Central Hudson* test, the court of appeals concluded that the regulations were sufficiently "'narrowly tailored to achieve the desired objective.'" App., *infra*, 29a (citation omitted). The court held that the 1,000-foot benchmark was not arbitrary because it had been copied from the FDA's proposed outdoor advertising regulations – even though respondent conceded in the district court that the distance "was based on the [FDA's] analysis of the visibility of large billboards." App., *infra*, 80a-81a. The First Circuit acknowledged that the record showed that the effect of using a 1,000-foot rule in Massachusetts would be to make all outdoor tobacco advertising illegal in up to 90% of the land area of the State's major cities, but it concluded that, despite the "sheer size" of the locations covered, the regulations were adequately tailored because these were all "areas where children are more likely to be." *Id.* at 30a.

The court of appeals also rejected petitioners' contention that the *indoor* advertising restrictions had not been shown to be narrowly tailored. The district court had invalidated these restrictions, largely because respondent presented no evidence to support them other than to point to the FDA regulations, which did *not* regulate indoor advertising. App., *infra*, 31a. The First Circuit expressed "misgivings" about the plausibility of respondent's assumption that minors under five feet tall will not look above eye-level, but it nonetheless reversed the district court on this issue, holding that "such determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.*

REASONS FOR GRANTING THE PETITION

The First Circuit's holding that Massachusetts' restrictions on tobacco advertising are not restrictions "with respect to advertising" is inconsistent with the text of the FCLAA, this Court's decision in *Cipollone*, and the Ninth Circuit's directly contrary decision in *Lindsey*. Moreover, the decision below, and others like it in other circuits, have encouraged literally dozens of jurisdictions to enact their own idiosyncratic tobacco

advertising regulations, thereby creating precisely the "patchwork" of diverse, nonuniform, and confusing cigarette advertising regulations that Congress sought to avoid in enacting the FCLAA. Review should be granted to resolve the conflict among the circuits with respect to this important question.

This Court should also grant review to address an important and recurring question concerning the applicability of *Central Hudson*. As several members of this Court have noted, the balancing test set forth in that case provides insufficient protection against a broadly based ban on a specific category of truthful, nonmisleading commercial speech. The Court, however, has yet to agree upon a standard for identifying what sort of commercial speech prohibitions might be subject to a more searching scrutiny than the *Central Hudson* test. This case provides a singularly appropriate vehicle for resolving that question. The issue of *Central Hudson*'s applicability was specifically raised and decided in the lower courts, and the unparalleled breadth and severity of the commercial speech restrictions in this case provide an ideal context for considering whether there are, in fact, any contexts in which the *Central Hudson* test ought not be applied. As set forth below, this Court's cases support the view that, when a particular restriction on truthful and nonmisleading commercial speech creates a substantial risk that the government is seeking to handicap the expression of particular ideas, the regulation must receive strict scrutiny, and the *Central Hudson* test is inapplicable. Those criteria are amply satisfied in this case, where the State has enacted a set of viewpoint-discriminatory regulations that effectively eliminate from public view an entire category of commercial speech concerning a highly disfavored product.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT OF AUTHORITY ON AN IMPORTANT QUESTION CONCERNING THE PROPER CONSTRUCTION OF THE FCLAA

A. The First Circuit's Construction Of The "With Respect To Advertising" Clause Of The FCLAA Is Inconsistent With *Cipollone* And Exacerbates A Circuit Split On This Important Question

This Court should grant review in order to resolve a well-developed conflict among the courts of appeals concerning the important question whether the FCLAA's preemption of requirements or prohibitions "with respect to the advertising" of cigarettes should be read to apply only to regulations with respect to the *content* of tobacco advertising. The decision below highlights a mature circuit split in which the First, Second, and Seventh Circuits are on one side and the Ninth Circuit is on the other side. Review should also be granted because the First Circuit's ruling is contrary to the statutory text, is inconsistent with this Court's decision in *Cipollone*, and has further undermined Congress' purpose in enacting the FCLAA, which was to avoid precisely the sort of diverse local regulations of tobacco advertising that have been upheld in this and other cases. Indeed, as of today, literally dozens of jurisdictions have enacted various tobacco-specific advertising regulations, and the decision below will only further accelerate this trend towards disuniformity. *See* App., *infra*, 128a-134a.

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, establishes a comprehensive federal program concerning the advertising and promotion of cigarettes. In its current form, the Act requires that cigarette packages sold or distributed in the United States contain certain warnings concerning the health effects of cigarettes, *id.*, § 1333; bans radio and television advertising of cigarettes, *id.*, § 1335; confirms the authority of the Federal Trade Commission (FTC) to regulate "unfair or deceptive acts or practices in the advertising of cigarettes," *id.*, § 1336; and requires the FTC to

submit annual reports to Congress concerning cigarette advertising, *id.*, § 1337. As part of this federal program, section 5(b) of the Act contains an express preemption of state law:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id., § 1334(b).

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court considered the extent to which § 5(b) of the FCLAA preempted state common law actions. In addressing that question, the Court unanimously agreed that the scope of the FCLAA's preemption provision was controlled by its express language. *See id.* at 521-22 (plurality) ("'We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part and dissenting in part) ("An interpreting court must 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'") (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990)); *id.* at 548 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part) (stating that the language of § 5(b) "should be given its ordinary meaning").

The First Circuit's construction of § 5(b) of the FCLAA in this case cannot be reconciled with *Cipollone*, with the statutory text, or with ordinary rules of common English usage. In upholding the challenged regulations, the First Circuit held that a restriction on the *location* of cigarette advertising is not a requirement "with respect to * * * advertising" of cigarettes within the meaning of § 5(b). The resulting anomalous construction – that a direct regulation of advertising is not a

regulation "with respect to" advertising – is utterly "at odds with the plain words" of the FCLAA, 505 U.S. at 521 (plurality), and disregards the "ordinary meaning" of the statutory language. *Id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ.). To be sure, there is room for debate concerning the circumstances in which a regulation of matters *other* than advertising must nonetheless be deemed to be a "requirement or prohibition with respect to advertising." *Compare id.* at 524, 528 (plurality) *with id.* at 555 (Scalia, J., joined by Thomas, J.); *cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-56 (1995). But to suggest that Massachusetts' severe regulation of cigarette advertising does *not* impose requirements "with respect to * * * advertising" does violence to the words chosen by Congress.[7]

In adopting this countertextual construction of the statute, the First Circuit largely followed the reasoning of the Second and Seventh Circuits on the same question. App., *infra*, 9a-13a. Like the First Circuit, those courts had concluded that the FCLAA's preemption provision did not apply to restrictions on the *location* of advertising. *See Greater N.Y. Metro. Food Council*, 195 F.3d at 109 (upholding a virtually identical New York City ordinance); *FAIR*, 189 F.3d at 639-40 (upholding a similar ordinance that prohibited most tobacco advertising in Chicago). But as the Ninth Circuit explained in rejecting this same exact reading of the statute, "[t]he distinction between location and content regulations is unsupportable by reference to the text" of § 5(b). *Lindsey*, 195 F.3d at 1072 (invalidating,

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[7] The First Circuit's reliance upon *Travelers* starkly illustrates its error. At issue in that case was a New York statute that did *not* specifically govern ERISA plans, and the question was whether the statute nonetheless was pre-empted because the statute "'relate[d] to'" an ERISA plan. 514 U.S. at 649-51 (quoting 29 U.S.C. § 1144(a)). The apt analogy is not to a statute that, as in *Travelers*, extends beyond benefit plans, but rather to a statute that, by its terms, *directly* regulates ERISA plans. *Travelers* confirms that such a statute would "relate to" an ERISA plan and would be preempted. *Id.* at 656, 668. Similarly, Massachusetts' direct regulation of cigarette advertising unquestionably is a prohibition "with respect to" cigarette advertising.

on preemption grounds, a substantially similar ordinance prohibiting all outdoor tobacco advertising in the Tacoma, Washington area). Indeed, contrary to *Cipollone*, the First Circuit's decision effectively rewrites the FCLAA so as to apply only to a "requirement or prohibition with respect to the [*content of*] advertising or promotion of any cigarettes." This sort of judicial amendment of the statute is flatly inconsistent with settled principles of statutory construction. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993) ("[W]e may not add terms or provisions where Congress has omitted them.").

Additionally, as the Ninth Circuit observed in *Lindsey*, there is another respect in which the content/location distinction is inconsistent with *Cipollone* and the statutory text. The plurality in *Cipollone* noted that, as originally enacted in 1965, § 5(b) of the FCLAA applied only to regulation of the *content* of advertising: "'[n]o *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes * * * .'" 505 U.S. at 514 (quoting Pub. L. 89-92, 79 Stat. 282, § 5(b)) (emphasis added). In 1969, however, the preemption provision was completely rewritten, so that it now reaches beyond regulation of the content of advertising to any regulation "with respect to" advertising:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply 'statement[s]' but rather 'requirement[s] or prohibition[s] * * * imposed under State law.' *Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes.*

505 U.S. at 520 (plurality) (emphasis added). The Ninth Circuit correctly noted that incorporating a "content" limitation into the current version of § 5(b) fails to give effect to Congress' deliberate change in the language of the provision: "[T]he distinction between content regulations and location regulations

cannot now be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements." 195 F.3d at 1074. Moreover, reading a content/location distinction into § 5(b) would disregard the clear difference in language between that provision and § 5(a) of the FCLAA, which narrowly and specifically preempts state-mandated warning labels on cigarettes. *Id.* ("In order to distinguish the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations.").[8]

The court of appeals did not dispute that its content/location distinction has no basis in the text of § 5(b). Rather, again following the Second and Seventh Circuits, the court stated that Massachusetts' "location" restrictions were not preempted by § 5(b) because they "do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress." App., *infra*, 12a; *see also Greater N.Y. Metro. Food Council*, 195 F.3d at 109 (same); *FAIR*, 189 F.3d at 639 (same). As the Ninth Circuit held in *Lindsey*, this argument patently misconstrues Congress' purpose both in enacting the FCLAA and in expanding its preemption provision in 1969:

> If every board of health, city, county, and state in this country regulated the location of tobacco advertisements * * * like the Board has in this case, the purpose of the FCLAA would be frustrated because the national economy would be impeded by diverse, nonuniform, and confusing

[8] In *Penn Advertising of Baltimore, Inc. v. Mayor & City Council*, 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996), the Fourth Circuit adopted the same content/location distinction, but purported to ground it in the "based on smoking and health" clause of § 5(b). But as the Second Circuit noted in *Greater N.Y. Metro. Food Council*, the argument that these facially *tobacco-specific* regulations are not "based on smoking and health" is "sophistry." 195 F.3d at 108. The First Circuit in this case likewise explicitly declined to adopt this view. App., *infra*, 13a n.6.

cigarette advertising regulations.

195 F.3d at 1074-75. Moreover, as Justice Blackmun (joined by Justices Kennedy and Souter) observed in his separate opinion in *Cipollone*, the 1969 amendment was intended, at a minimum, "to ensure that a State could not do through negative mandate (*e.g., banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements)." 505 U.S. at 539 (emphasis added). Massachusetts' effort to ban outdoor cigarette advertising in virtually all populated areas of the State directly frustrates Congress' intent to prevent States from "banning all cigarette advertising." *Id.*

The legislative history confirms Congress' intent that States be prohibited from any effort to impose distinctive requirements on *tobacco* advertising. In the face of renewed state efforts to regulate or ban cigarette advertising, *see Cipollone*, 505 U.S. at 515 & n.11, Congress amended the Act in 1969 precisely to further protect against "the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 (1969), at 12. The resulting legislative compromise included a strengthening of the required warning labels, a prohibition of cigarette advertising on radio or television, an affirmation of the FTC's jurisdiction over certain aspects of cigarette advertising – and a significant broadening of the preemptive scope of the Act. *See* Pub. L. 91-222, 82 Stat. 89 (1970).

The First Circuit also sought to justify its holding on the ground that, because zoning restrictions were "peculiarly within the states' historic police powers," § 5(b) should be narrowly construed, in accordance with the "presumption against preemption," so as not to restrict regulations concerning the location of advertising. App., *infra*, 11a (quoting *Greater N.Y. Metro. Food Council*, 195 F.3d at 109). This analysis fails, however, because it ignores this Court's holding in *Cipollone* that the "presumption against pre-emption" cannot be invoked *in disregard of the statutory text*. *Cipollone*, 505 U.S. at 523 (plurality) (notwithstanding any "presumption against pre-

emption," the phrase "state law" in § 5(b) could not "fairly" be construed to exclude state common law); *id.* at 548-49 (Scalia, J., joined by Thomas, J.) (agreeing that § 5(b) covered common law claims, but rejecting any presumption against preemption). *See also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where the language is clear, there is "no reason * * * even to resort to the canons of construction that we use to resolve doubtful cases"). Moreover, the First Circuit's faulty analogy to zoning restrictions also ignores Congress' intent specifically to prohibit a patchwork of *tobacco-specific* advertising regulations.

The Ninth Circuit's decision in *Lindsey* refutes, point-by-point, the Second and Seventh Circuits' construction of the "with respect to * * * advertising" clause of § 5(b). By expressly rejecting the Ninth Circuit's approach and instead aligning itself with the Second and Seventh Circuits, App., *infra*, 13a n.7, the First Circuit has deepened and exacerbated the circuit conflict that exists on this important issue. This split of authority among the lower courts is ripe for resolution by this Court.

B. The Division Of Authority Among The Lower Courts Has Encouraged The Enactment Of Dozens Of Different Local Restrictions On Tobacco Advertising, Contrary To Congress' Intent In Enacting The FCLAA

The decision below, like the comparable decisions of the Second and Seventh Circuits, directly frustrates the FCLAA's purpose of "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514. Indeed, there are now literally dozens of different local ordinances that impose special restrictions only on tobacco advertising, thereby seriously impeding Congress' purpose in enacting the FCLAA. *See* App., *infra*, 128a-134a. The continued proliferation of these restrictions — some of which have been upheld and others of which have been held

preempted — demonstrates that the issue is important and recurring. It also demonstrates that the question is of substantial concern, not only to the parties to this action, but also to literally thousands of retailers throughout the country, as well as to dozens of state and local governments. This Court should grant certiorari to resolve this important question.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARDS APPLICABLE TO A BROADLY BASED PROHIBITION ON A SPECIFIC CONTENT-BASED CATEGORY OF TRUTHFUL AND NONMISLEADING COMMERCIAL SPEECH

A. This Case Raises An Important And Recurring Question Concerning The Proper Scope Of This Court's Decision In *Central Hudson*

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), this Court adopted an intermediate-scrutiny test for addressing First Amendment challenges to restrictions on commercial speech. Under that test, the Court must consider whether the restriction "directly advances" a "substantial" state interest and "is no more extensive than necessary" to further that interest. *Id.* at 564, 566-67. However, there is considerable uncertainty about whether *Central Hudson* applies across-the-board to all restrictions on commercial speech or whether the applicability of that test is or should be more limited.

The Court's most recent commercial speech cases highlight the extent of the uncertainty regarding the scope of *Central Hudson*. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999), eight Justices noted that "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." The Court concluded that the gambling advertising restrictions at issue in that case were unconstitutional even under the

intermediate-scrutiny test adopted in *Central Hudson*, and it expressly reserved the question of what circumstances might justify a stricter standard in the commercial speech area. *See id.*

This uncertainty was even more apparent in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), in which the Court unanimously invalidated the liquor advertising restrictions at issue, but was deeply divided over the proper scope of *Central Hudson*. Five Justices in *44 Liquormart* concluded that *Central Hudson* does *not* state the appropriate test for all commercial-speech restrictions. Justices Stevens, Kennedy, and Ginsburg expressly rejected the proposition that "all commercial speech regulations are subject to a similar form of constitutional review" and instead concluded that intermediate scrutiny is appropriate only where a state acts to protect consumer choice in the underlying marketplace, rather than to suppress truthful and nonmisleading information:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for affording constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Id. at 501 (plurality). Justice Thomas similarly concluded that intermediate scrutiny was inappropriate "at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark," and he asserted even more broadly that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" *Id.* at 522-23 (Thomas, J., concurring in the judgment). Justice Scalia

likewise "share[d] Justice Thomas's discomfort with the *Central Hudson* test," which he found "to have nothing more than policy intuition to support it," and he argued that commercial speech should be judged by reference to "the long accepted practices of the American people." *Id.* at 517 (Scalia, J., concurring in the judgment).

In other recent cases as well, several Justices have raised similar questions about the proper scope of the intermediate-scrutiny test of *Central Hudson*. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring in the judgment) (*Central Hudson* applies only where government seeks to "prohibit misleading speech that would be protected in other contexts" or to "requir[e] affirmative disclosures that the speaker might not make voluntarily"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34 & n.1 (1993) (Blackmun, J., concurring in the judgment) (intermediate scrutiny is appropriate only where commercial speech involves "false statements of fact" or "advocat[es] illegal activities"). Thus, over the last decade alone, six Justices – including a majority of the current Court – have indicated that *Central Hudson* does not or should not establish a test of intermediate scrutiny that is generally applicable to *all* commercial speech restrictions.

This concern about the proper scope of *Central Hudson* tracks the Court's more general First Amendment principles. Under those principles, content-based restrictions on speech are highly suspect. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980) ("Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.") (internal quotation marks omitted); *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its

subject matter, or its content."). Moreover, viewpoint-based restrictions are even more suspect. *See, e.g., Rosenberger v. Rector & Visitors of Univ.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

To be sure, many commercial speech restrictions are content-based. But the Court has never held that the constitutional presumptions against content-based and viewpoint-based speech restrictions are entirely inapplicable in the commercial speech context. On the contrary, the Court repeatedly has invalidated commercial-speech restrictions that it concluded were impermissibly content-based. *See, e.g., Discovery Network*, 507 U.S. at 428-30; *Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85, 96 (1977); *see also 44 Liquormart*, 517 U.S. at 501 (plurality) ("Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression.").

Moreover, in *R.A.V.*, this Court established general principles for assessing the constitutionality of content-based restrictions on entirely *unprotected* categories of speech. The Court held that if such restrictions rest on a justification unrelated to the "distinctively proscribable content" of the entire category of speech at issue, "they are presumptively invalid" and must receive strict scrutiny. *See* 505 U.S. at 382-84. As examples of permissible and impermissible content-based distinctions under this rule, the Court explained that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising

that depicts men in a demeaning fashion." *Id.* at 388-89 (citations omitted). Applying similar logic, four Justices in *44 Liquormart* found it "perfectly clear" that a State "could not ban all obscene liquor ads except those that advocated temperance." 517 U.S. at 513 (plurality). These principles rest on the fundamental premise that, whatever the category of speech at issue, content-based regulation is suspect whenever there is a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. If these principles apply to entirely unprotected categories of speech (as *R.A.V.* held), then they also must apply to commercial speech (which plainly *is* protected as a category).

These principles apply fully to this case, which presents an ideal vehicle for clarifying the outer limits of *Central Hudson*. The question whether *Central Hudson* should apply here was specifically argued and decided in the lower courts. Indeed, the First Circuit expressly acknowledged "the recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification," but it concluded that "it is not our role to anticipate changes in well-established constitutional doctrines." App., *infra*, 16a. Moreover, this case involves precisely the sort of broadly-based prohibition to which *Central Hudson* is or should be inapplicable. As the matter comes to this Court, there is no dispute that the advertising at issue involves only "truthful, nonmisleading speech about a lawful activity." *Id.* at 17a. There is also no serious dispute that the regulations, which target only *tobacco* advertising, are "plainly content-based." *Id.* at 14a. And there is also no dispute about the singular sweep and severity of Massachusetts' restrictions, which cover approximately 90 percent of the most populated areas of the State and which foreclose all practical alternative channels of advertising for many retailers. *Id.* at 31a-34a. In sum, if there is ever to be a case in which *Central Hudson* ought not be applied, this is that case.

In particular, this case satisfies any of the possible standards

that might warrant the application of strict scrutiny. Under the test advocated by Justices Stevens, Kennedy, and Ginsburg in *44 Liquormart*, strict scrutiny is appropriate because the Massachusetts advertising regulations do not "protect consumers from misleading, deceptive, or aggressive practices," and do not "requir[e] the disclosure of beneficial consumer information," but instead "prohibi[t] the dissemination of truthful, nonmisleading, commercial messages for reasons unrelated to the preservation of a fair bargaining process." *44 Liquormart*, 517 U.S. at 501 (plurality opinion); *cf. Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) (statute that "completely suppress[es]" information about a product is unconstitutional).[9] Under the test advocated by Justice Thomas (and for which Justice Scalia expressed support), strict scrutiny is appropriate because Massachusetts seeks to achieve its interest "through keeping would-be recipients of speech in the dark." *44 Liquormart*, 517 U.S. at 522-23 (opinion concurring in the judgment). And, under the more general principles adopted by the Court in *R.A.V.*, strict scrutiny is appropriate because the content-based restrictions on *tobacco* advertising cannot be justified by tobacco-specific concerns about fraud or a fair bargaining process, *see* 505 U.S. at 388; on the contrary, respondent has conceded *arguendo* that the prohibited advertising involves the suppression of truthful and nonmisleading speech. App., *infra*, 17a.

Moreover, the tobacco regulations are *viewpoint*-based because they apply only to communications that "*promote* the use or sale" of tobacco, *see* 940 C.M.R. 21.03, App., *infra*, 107a (emphasis added), and, as the court of appeals acknowledged, they do *not* similarly apply to other "tobacco-related speech

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[9] The statute in *Carey* was invalidated to the extent that it prohibited the "advertisement or *display*" of contraceptives, *see* 431 U.S. at 700 (emphasis added). Accordingly, the same First Amendment principles apply to the display regulations at issue in this case, *see* 940 C.M.R. 21.04(2)(c), (d), App., *infra*, 109a; *id.*, § 22.06(2)(c), (d), App., *infra*, 121a; as to the advertising regulations, *see* 940 C.M.R. 21.04(5), App., *infra*, 111a ; *id.*, § 22.06(5), App., *infra*, 123a.

that has a purpose or effect other than promotion, such as public health campaigns." App., *infra*, 14a. Indeed, as the First Circuit acknowledged, the tobacco regulations seek to "dispe[l] the advertising-encouraged notion that tobacco products are pervasive and form part of the 'good life.'" *Id.* at 29a. In First Amendment terms, they are thus even worse than the viewpoint-*neutral* restriction on "information concerning any lottery" that was unanimously invalidated in *Greater New Orleans Broadcasting*, 527 U.S. at 177, or the viewpoint-*neutral* restriction on alcohol price advertising that was unanimously invalidated in *44 Liquormart*, 517 U.S. at 490.[10]

Finally, the inherent manipulability of the *Central Hudson* balancing test further counsels against its application to the sort of broadly based restrictions on truthful and nonmisleading commercial speech at issue here. Applying *Central Hudson*, the district court concluded that the level of First Amendment protection for commercial speech varies according to whether the product at issue is "socially- or politically-important," and whether it has any "readily discernable social or health benefits." App., *infra*, at 66a. For its part, the court of appeals stressed that *Central Hudson* permits a wide "range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.* at 31a. Under these vague and forgiving standards, further attacks on the truthful and nonmisleading advertising of politically unpopular products can be expected to accelerate. This Court would be forced either to abandon its policing of such restrictions or instead to continue reviewing such restrictions (as it recently has done in *Coors*, *44*

[10] While simultaneously attempting to suppress speech that promotes the use or sale of tobacco, Massachusetts itself is actively engaged in speech to discourage that use or sale; indeed, then-Attorney General Harshbarger announced his decision to promulgate these regulations as part of the State's continuing "war against Big Tobacco." JCA 323. Although such comments are undoubtedly politically popular, they serve only to reinforce the need for strict scrutiny: "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

Liquormart, and *Greater New Orleans Broadcasting*), based on case-specific applications of *Central Hudson*. The unattractiveness of these options confirms that a more rigorous test is appropriate in these circumstances.

The court of appeals applied intermediate scrutiny to a content-based and viewpoint-based regulation that largely suppresses public display of truthful and nonmisleading speech about a single, politically unpopular product. This Court should grant review to determine whether the *Central Hudson* test can be so far extended.

B. The Court Should Grant Certiorari To Determine Whether *Central Hudson* Permits A Virtual Ban On Outdoor Tobacco Advertising In Order To Insulate Minors From Tobacco

Even assuming that intermediate scrutiny were appropriate, this Court should grant review to determine whether *Central Hudson* permits a virtual ban on the advertising of any product, such as tobacco, that is lawful for adults but not for children. The First Circuit construed *Central Hudson* to permit such a virtual ban. Its decision not only conflicts with this Court's precedents but will, if left undisturbed, establish a sweeping new "vice" exception to those precedents.

Central Hudson makes clear that restrictions on commercial speech must be "'not more extensive than is necessary'" to directly advance substantial government interests. *Greater New Orleans Broadcasters*, 527 U.S. at 183 (quoting *Central Hudson*, 447 U.S. at 566). Accordingly, this Court has required restrictions on commercial speech to leave open adequate alternative channels for advertising the product or service at issue: it has upheld restrictions that left open "many alternative channels for communicating necessary information" about the product or service, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633-34 (1995), and it repeatedly has invalidated restrictions where no such "alternative channels" were readily available. *See, e.g.*, *44 Liquormart*, 517 U.S. at 501-02

(plurality); *id.* at 529-30 (O'Connor, J., concurring in the judgment); *Linmark Assocs.*, 431 U.S. at 92-94.

Applying these principles, this Court has held that, despite the importance of insulating minors from certain products, commercial speech restrictions cannot "'reduce the adult population * * * to reading only what is fit for children.'" *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In *Bolger*, this Court invalidated a federal statute prohibiting unsolicited mailed advertisements for contraceptives. Despite acknowledging the importance of the government interest in protecting children from these advertisements, the Court concluded that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74. Quoting Justice Frankfurter, the Court reasoned that banning commercial speech about a product lawful for adults, in order to protect children from exposure to the product, would surely "'burn the house to roast the pig.'" *Id.* at 74 n.27 (quoting *Butler*, 352 U.S. at 383). Similarly, in *Carey v. Population Services International*, *supra*, this Court invalidated a state statute prohibiting advertisements for contraceptives. In rejecting an argument that such advertisements "would legitimize the sexual activity" of children, the Court responded that this was "classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment." 431 U.S. at 700.

The Court repeatedly has applied this same principle to invalidate broad restrictions on indecent speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court relied on *Bolger* in invalidating a federal statute that severely restricted Internet indecency. *Id.* at 875. In *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court relied on *Bolger* to invalidate a federal statute severely restricting cable broadcast indecency, despite recognizing that "[n]o provision * * * short of an absolute ban, can offer certain protection against assault by a determined child." *Id.* at 759. And in *Sable*

Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), the Court relied on *Bolger* to invalidate a federal statute prohibiting indecent telephone communications, despite recognizing that restrictions short of a ban would permit "the most enterprising and disobedient young people to secure access to such messages." *Id.* at 128.

The decision below conflicts with these precedents. In this case, the First Circuit rejected petitioners' contention that commercial speech restrictions cannot "deny communication to a large number of adults for the sake of protecting children." App., *infra*, 34a. The court of appeals reasoned that this principle applies only to what it termed "expressive" speech, but not to "commercial" speech. *Id.* That analysis conflicts with the square holdings of *Bolger* and *Carey* (which involved commercial speech) and with the logic of this Court's recent indecency cases (which routinely have quoted *Bolger* for the proposition that the government cannot "reduce the adult population to only what is fit only for children"). The court of appeals also concluded that these principles were inapposite because the advertising restrictions at issue were not "equivalent to a 'blanket ban' on speech." *Id.* Under that reasoning, *Bolger* would apply only to a complete prohibition against advertising the disfavored product, and the interest of protecting children would support an *almost*-complete prohibition against such advertising – here, one encompassing 90% of the relevant area. In sum, *Bolger* and its progeny would be virtually a dead letter in the very commercial speech context in which that case was decided.[11]

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[11] Even apart from its evisceration of *Bolger*, the court of appeals grossly misapplied the narrow tailoring requirement of *Central Hudson*. For example, the court concluded that the 1,000-foot radius was not overbroad even though it would foreclose outdoor tobacco advertising in up to 90% of the largest metropolitan areas in the State. App., *infra*, 30a. The court reasoned that Massachusetts could permissibly adopt the same radius selected in a purported FDA rulemaking (*id.* at 31a), but the incorporation of an FDA standard hardly insulates that standard from First Amendment scrutiny. Indeed, in recent years this Court twice has unanimously invalidated advertising restrictions imposed by federal *statutes*. *See Greater*

The First Circuit's tailoring analysis thus has implications far beyond tobacco advertising. By eviscerating *Bolger* and its progeny, the decision below permits a near-total ban on the advertising of *any* product – ranging from tobacco to gambling to alcohol – that is lawful and appropriate for adults but not for children. Not only would the adult population be reduced to seeing "only what is fit only for children," *Bolger*, 463 U.S. at 73, but the interest in protecting children from such products would, in effect, give rise to a broadly applicable "vice exception" to the commercial speech doctrine. This Court squarely has held that there is no such exception for dangerous or adult-only products, *see Coors*, 514 U.S. at 482 n.2, and the Court should reject the First Circuit's attempt to create such an exception through its repudiation of *Bolger* and its transparent manipulation of the narrow tailoring requirements of *Central Hudson*.

New Orleans Broadcasting, *supra*; *Coors*, *supra*. If courts may engage in vigorous First Amendment review of congressional restrictions on commercial speech, then they also may do so for restrictions imposed by federal or state administrative action, to say nothing of restrictions imposed by a federal agency that was later held to lack jurisdiction over the very product at issue, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The court further reasoned that a 1,000-foot radius must be permissible because some of these petitioners previously had agreed to refrain from *billboard* advertising within a *500-foot* radius of schools. App., *infra*, 31a. But doubling the radius at issue causes the associated area to increase *fourfold*; accordingly, if a 1,000-foot radius would foreclose advertising across 90% of a metropolitan area, a 500-foot radius might only foreclose advertising in less than 22% of the same area. And if a coverage extension from 22% to 90% can be blithely dismissed as "splitting hairs," *id.*, then the concept of narrow tailoring has lost all meaning.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2000

APPENDIX A

Nos. 00-1107, 00-1117, 00-1118 and 00-1270 to 00-1275

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

CONSOLIDATED CIGAR CORPORATION; General Cigar Co., Inc.; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd.; Swedish Match North America, Inc.;

Plaintiffs, Appellants,

v.

Thomas F. REILLY, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellee.

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris, Inc.; United States Tobacco Company,

Plaintiffs.

United States, *Interested Party.*

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris, Inc.;

Plaintiffs, Appellants,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellee.

United States Tobacco Company; Consolidated Cigar Corporation; General Cigar Co., Inc.; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd.,

Plaintiffs.

United States, *Interested Party.*

United States Tobacco Company,

Plaintiff, Appellant,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellee.

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris, Inc.; Consolidated Cigar Corporation; General Cigar Co., Inc.; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd.;

Plaintiffs.

United States, *Interested Party.*

Lorillard Tobacco Company; Philip Morris, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; United States Tobacco Company; Consolidated Cigar Corporation; General Cigar Co., Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd., *Plaintiffs, Appellees,*

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellant.

United States, *Interested Party.*

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris, Inc.; United States Tobacco Company; Consolidated Cigar Corporation; General Cigar Co., Inc.; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd.,

Plaintiffs, Appellees,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellant.

United States, *Interested Party.*

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris, Inc.; United States Tobacco Company; Consolidated Cigar Corporation; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd.; Philip Morris, Inc.,

Plaintiffs, Appellees,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellant.

United States, *Interested Party.*

Consolidated Cigar Corporation; General Cigar Co., Inc.; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swisher International, Inc.; Tobacco Exporters International (USA) Ltd.; Swedish Match North America, Inc.; Lorillard Tobacco Company; Philip Morris, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; United States Tobacco Company;

Plaintiffs, Appellees,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Defendant, Appellant.

United States, *Interested Party.*

Heard April 7, 2000.
Decided July 17, 2000.

Before TORRUELLA, Chief Judge, BOWNES, Senior Circuit Judge, and LIPEZ, Circuit Judge.

TORRUELLA, Chief Judge.

Before the Court is a challenge to regulations promulgated by the Attorney General of Massachusetts which restrict the sale, promotion, and labeling of tobacco products in an effort to reduce the use of such products by minors. Three groups of tobacco companies[1] have sued the Attorney General, claiming that the Massachusetts regulations are partially preempted by federal law, that the regulations violate their First Amendment right to free speech, and that the regulations violate the Commerce Clause of the Constitution. After due consideration

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[1] The appellants in these consolidated appeals include manufacturers of cigarettes, smokeless tobacco products, and cigars.

of the arguments pressed by all parties and by amici curiae, and with full appreciation of the importance of the public health issue underlying this case, we conclude (1) that the regulations are not preempted by federal law, (2) that the regulations do not violate the First Amendment, and (3) that parts of the regulations unconstitutionally burden interstate commerce. Accordingly, we affirm in part and reverse in part the decision of the district court.

I. Factual and Procedural Background

On January 22, 1999, the Attorney General of Massachusetts promulgated regulations now codified at title 940, sections 21.00 through 21.07 (cigarettes and smokeless tobacco) and title 940, sections 22.00 through 22.09 (cigars) of the Massachusetts Code of Regulations. The regulations declare certain types of conduct by manufacturers, distributors, and sellers of tobacco products to be *per se* "unfair or deceptive acts or practices" prohibited under chapter 93A, § 2(a) of the Massachusetts General Laws. For example, the regulations prohibit a number of retail practices including promotional give-aways and mail ordering without age verification, *see* 940 C.M.R. §§ 21.04(1), 22.06(1), as well as measures aimed specifically at outlet sales practices, *see id.* §§ 21.04(2)-(3), 22.06(2)-(3). Of particular concern to the tobacco companies, the Massachusetts regulations also prohibit the following advertising practices:

> (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
>
> (b) Point-of-sale advertising ... any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18

> years old, which is located within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

Id. §§ 21.04(5), 22.06(5). A single exception to the advertising ban permitted the display of a so-called "tombstone" sign stating "Tobacco products sold here," *see id.* §§ 21.04(6), 22.06(6), but this provision was struck down by the district court on preemption grounds.[2] Finally, the regulations also prescribe mandatory warning statements to be included on all cigar labeling and advertising. *See id.* §§ 22.04, 22.05.

In response to the promulgation of the regulations, three separate suits were filed in federal district court by the appellants in this consolidated appeal, who are makers and sellers of cigarettes, smokeless tobacco products, and cigars. The cigarette and smokeless tobacco companies claimed that the Massachusetts regulations were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), codified as amended at 15 U.S.C. §§ 1331-41, and that the regulations violated their commercial speech rights under the First Amendment.[3] The cigar companies also challenged the regulations on First Amendment grounds, as well as claiming that the regulations imposed an undue burden on interstate commerce in violation of the Commerce Clause. In an opinion issued December 2, 1999, the district court rejected the preemption arguments of the cigarette and smokeless tobacco producers. *See Lorillard Tobacco Co. v. Reilly*, 76 F.Supp.2d 124 (D.Mass.1999) (*Lorillard I*). In a January 24, 2000

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[2] This aspect of the district court's decision has not been appealed and therefore is not before us.

[3] Although the FCLAA applies only to cigarettes, the smokeless tobacco companies join the cigarette makers' challenge because they contend that the regulations may not be severed to preserve the smokeless tobacco provisions if the cigarette provisions are declared invalid. We do not reach this aspect of the companies argument because we hold that the regulations are not preempted by the FCLAA.

opinion, the district court likewise rejected the tobacco companies' First Amendment claims, as well as the cigar makers' Commerce Clause challenge. *See Lorillard Tobacco Co. v. Reilly*, 84 F.Supp.2d 180 (D.Mass.2000) (*Lorillard II*).[4] Judgment was entered on January 25, 2000 in favor of the Attorney General, and this appeal followed.

On appeal, the tobacco companies raise the following issues: (1) whether the Massachusetts regulations are preempted by federal law, (2) whether the regulations' advertising restrictions violate the First Amendment, (3) whether certain restrictions imposed on retail practices violate the First Amendment, (4) and whether the regulations' cigar warnings requirements violate the First Amendment and the Commerce Clause. The Attorney General cross-appeals one issue--whether the regulations' indoor advertising restrictions violate the First Amendment.

II. Law and Application

A. Preemption

1. Introduction

The Supreme Court has explained the analysis for determining when a state regulation is preempted by a federal law that contains specific preemption language. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996), the Court stated that, to identify the domain expressly preempted by the federal statute, two presumptions about the nature of preemption must be considered. First, particularly when Congress has "'legislated ... in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not

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[4] The district court did invalidate one aspect of the regulations under the First Amendment, finding that the Attorney General had failed to demonstrate that the point-of-sale provisions requiring indoor advertisements to be at least five feet from the floor were sufficiently tailored to serve the government's interests. *See Lorillard II*, 84 F.Supp.2d at 192-93.

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 485, 116 S.Ct. 2240. Second, in determining the scope of the federal preemption, the "ultimate touchstone" is Congress's purpose as "discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.* at 486, 116 S.Ct. 2240. In this respect, it is relevant to consider the "'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*

The tobacco companies argue, rather weakly we might say, that the "presumption against preemption" should not be applied in this case because the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, --- U.S. ---, ----, 120 S.Ct. 1135, 1147, 146 L.Ed.2d 69 (2000). However, as the Court noted in *Locke*, the area at issue there--maritime commerce--is one in which "Congress has legislated from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.* at ----, 120 S.Ct. at 1148. We have little difficulty distinguishing the historically pervasive federal regulation of fields such as maritime commerce, *see, e.g.*, *Kelly v. Washington*, 302 U.S. 1, 4, 58 S.Ct. 87, 82 L.Ed. 3 (1937) ("The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation."), from Congress's relatively recent entry into the regulation of the tobacco industry. The thirty-five years that have passed since passage of the FCLAA, with its limited scope when compared to federal regulation of fields such as maritime commerce, can hardly serve as a basis for supplanting the traditional state authority in matters of public health, particularly that of minors. *See Medtronic*, 518 U.S. at 475, 116 S.Ct. 2240 ("Throughout our history the several States have exercised their police powers

to protect the health and safety of their citizens. Because these are 'primarily, and historically, ... matters of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (citations omitted)). The "presumption against preemption" applies with full force to this case.

We turn, therefore, to our task of identifying "the domain expressly preempted" by § 1334(b), *id.* at 484, 116 S.Ct. 2240, keeping in mind (1) the presumption that Congress does not intend to supplant state regulation in the area of public health and the health of minors without a clear and manifest indication of such preemptory purpose, *see id.* at 485, 116 S.Ct. 2240, and (2) that our decision must "rest primarily on a 'fair understanding of congressional purpose,' " as informed by the text, the statutory framework, and the purpose of the FCLAA as a whole, *id.* at 486, 116 S.Ct. 2240.

2. The Preemptive Scope of § 1334(b)

Section 1334(b) of the FCLAA states that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). To date, four other federal courts of appeals have addressed the preemptive scope of this provision. *See Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir.1999); *Greater New York Metro. Food Council v. Giuliani*, 195 F.3d 100 (2d Cir.1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir.1999) ("*FAIR*"); *Penn Advertising of Baltimore, Inc. v. Mayor & City Council of Baltimore*, 63 F.3d 1318 (4th Cir.1995). We find the Second and Seventh Circuits' decisions in *Giuliani* and *FAIR* to be particularly helpful.

In *Giuliani*, the United States Court of Appeals for the Second Circuit focused on the ambiguity in the phrase "with

respect to" advertising and promotion. *See Giuliani*, 195 F.3d at 105. As the court noted, a "hyper-literal" reading of that phrase would preempt a range of state regulation which Congress surely did not intend to affect. *Id.* For example, "it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or ... it could lead to the conclusion that 'states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard.'" *Id.* (citing *FAIR*, 189 F.3d at 633).

Given the ambiguity of the preemption provision, the Second Circuit endeavored to discern Congress's intent in enacting § 1334(b). Relying on the FCLAA's statement of purpose at 15 U.S.C. § 1331, the court reached two conclusions regarding the intended scope of § 1334(b): first, that Congress sought to inform the public of the health risks associated with smoking, and second, that while so informing the public Congress also sought to protect the national economy from the burdens that would result from a multitude of "'diverse, nonuniform, and confusing' advertising standards." *See Giuliani*, 195 F.3d at 106. The court logically concluded that § 1334(b)'s preemption provision was intended to further that congressional balance by preempting state regulations that would frustrate federal law by creating a "'multiplicity of conflicting regulations.'" *Id.*

Applying this reading of § 1334(b) to a 1000-foot rule essentially identical to that imposed by the Massachusetts regulations, the court found that the regulation was not preempted by the FCLAA because it "[did] not impose obligations 'with respect to' advertising as that phrase is used in § 1334(b)." *Id.* at 109. The court found that the 1000-foot restriction "do[es] not touch upon Congress's 'comprehensive Federal program' to control cigarette advertising information. The restrictions do not, for example, burden advertisers with a duty to warn. Nor do they impose content and format requirements on advertising information." *Id.* Although the

court did recognize that different states *and municipalities* might impose differing regulations with regard to the location of tobacco advertising, "[d]ivergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them." *Id.*

Finally, the court in *Giuliani* also emphasized that "the presumption against preemption is particularly strong here, as these provisions are the sort thought to lie within the heartland of the states' historic powers." *Id.* (citing *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240). Both zoning regulations and regulations directed at the safety and welfare of minors, the court said, "lie peculiarly within the states' historic police powers." *Id.* (citing *Packer Corp. v. Utah*, 285 U.S. 105, 111, 52 S.Ct. 273, 76 L.Ed. 643 (1932) (zoning restrictions on cigarette advertising), and *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir.1992)). Far from the clear and manifest intent required to preempt state regulation in such areas, the court noted that the legislative history of § 1334(b) suggests that Congress specifically intended to give such traditional state laws "wide berth." *Id.* at 110 (citing S.Rep. No. 91-566, reprinted in 1970 U.S.C.C.A.N. at 2663). Based on the foregoing, the Second Circuit held that the 1000-foot restriction was not preempted by the FCLAA.

The United States Court of Appeals for the Seventh Circuit used a similar analysis to find that § 1334(b) did not preempt Chicago regulations restricting the advertising of cigarettes and alcoholic beverages. Relying largely on the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), in which the court considered the similar preemption provision of the Employee Retirement Income Security Act (ERISA), the Seventh Circuit concluded that "[i]f the FCLAA language ('with respect to advertising and promotion') were viewed with an 'uncritical literalism,' the effect would be to 'read Congress's words of limitation as mere

sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.'" *FAIR*, 189 F.3d at 637 (quoting *Travelers Ins.*, 514 U.S. at 656, 115 S.Ct. 1671).

As in *Giuliani*, the *FAIR* court then turned to an examination of the legislative history and overall scheme of the FCLAA and § 1334(b) to discern the intended scope of the preemption provision. *See id.* (relying on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), and *Medtronic*, 518 U.S. at 484-85, 116 S.Ct. 2240). After examining the statement of purpose found in § 1331 and the legislative history of § 1334(b), the court concluded:

> We therefore must read the language of the FCLAA preemption provision in light of Congress's desire not only to ensure uniformity of regulation with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

FAIR, 189 F.3d at 638. Noting that the placement and manner of outdoor advertising is a matter of traditional local concern, the court declined to imply preemption of a regulation of such local interest and importance. *Id.* at 639. The court further concluded that the restrictions posed no danger of interfering with the FCLAA's advertising and labeling scheme, and held that they were not preempted by § 1334(b).[5]

We are persuaded by the reasoning of our sister circuits that Congress did not intend § 1334(b) to preempt the kind of tobacco advertising restrictions imposed by the Massachusetts regulations. The regulations do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress, and to the extent that they may create

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[5] Both the *FAIR* and the *Giuliani* courts found that "tombstone" provisions similar to that invalidated by the district court were preempted by § 1334(b). See *FAIR*, 189 F.3d at 640; *Giuliani*, 195 F.3d at 108.

differing restrictions on the location of advertising in various states and municipalities, such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country.[6] We do not consider such location restrictions to present the kind of "diverse, nonuniform, and confusing" advertising standards with which Congress was concerned when it enacted the FCLAA. *See Giuliani*, 195 F.3d at 106-07; *see also* 15 U.S.C. § 1331.[7] Thus, we hold that the Massachusetts regulations are not preempted by the FCLAA.

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[6] The Fourth Circuit, in *Penn Advertising*, 63 F.3d at 1324, found that Baltimore's restrictions on outdoor cigarette advertisements were not preempted by § 1334(b). Although we do not adopt that court's apparent conclusion that location restrictions do not constitute a " 'prohibition based on smoking and health,'" *id.*, we do agree with the general conclusion that Congress did not intend § 1334(b) to preempt restrictions of the kind at issue there and in this case.

[7] We also note that the Ninth Circuit, in *Lindsey*, 195 F.3d at 1073, concluded that a county ordinance banning all outdoor tobacco advertising was preempted by § 1334(b). That court determined that "[d]espite the holdings of *Penn Advertising*, *FAIR*, and *Giuliani*, the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a 'requirement or prohibition based on smoking and health ... with respect to the advertising or promotion of any cigarettes.'" *Id.* (quoting 15 U.S.C. § 1331). With all due respect, we conclude that the court's analysis fails to avoid the "uncritical literalism" that the Supreme Court has cautioned us against, *Travelers Ins.*, 514 U.S. at 656, 115 S.Ct. 1671, and we disagree that " '[t]here is no good reason to believe that Congress meant less than what it said,'" *Lindsey*, 195 F.3d at 1073, in the phrase "with respect to advertising." We find the decisions of the Second and Seventh Circuits more in line with our reading of Congress's purpose, and more in line with our understanding of the Supreme Court's instructions in the area of federal preemption.

B. First Amendment Challenge to Advertising Restrictions

The next claim, urged by all three groups of tobacco companies, is that the advertising restrictions imposed by the Massachusetts regulations violate the companies' First Amendment right to freedom of speech. We find this contention unpersuasive.

1. Level of Review

The tobacco companies first argue that the advertising and promotion restrictions at issue here should be subject to a more searching review than the "intermediate" scrutiny traditionally applied in commercial speech cases. *See generally Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561-66, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). According to the companies, the regulations target tobacco advertising because of its content and therefore should be subject to a more demanding First Amendment analysis. The Attorney General, in contrast, characterizes the regulations as content-neutral and urges us to deferentially apply the *Central Hudson* test for commercial speech restrictions.

First, we repeat our conclusion (reached in the preemption analysis) that the regulations are content-based. The regulations apply only to advertising "the purpose or effect of which is to promote the use or sale of the [tobacco] product." 940 C.M.R. §§ 21.03, 22.03 (defining "advertisement"). Advertising of other products is not restricted by the regulations, nor is tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns. Contrary to the Attorney General's suggestion, this type of focus is plainly content-based.

Such conclusion does not, however, require a greater level of scrutiny than the standard *Central Hudson* analysis. The tobacco companies argue that the regulations amount to inherently suspect "viewpoint discrimination" because they ban only speech that invites the purchase of tobacco products. However, the Supreme Court has made clear that even

regulations which single out the promotional speech of a particular industry are analyzed under the *Central Hudson* test. *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (applying *Central Hudson* to regulations restricting advertisements for casino gambling).

The tobacco companies nevertheless argue that our decision in *AIDS Action Committee v. MBTA*, 42 F.3d 1, 11 (1st Cir.1994), supports the application of a higher level of scrutiny. In that case, Boston's transportation authority refused to display public service advertisements for the AIDS Action Committee on the purported basis that the ads "describe[d] sexual content in a patently offensive way," *id.* at 5, but agreed to carry ads with similar or more explicit content by other speakers. We held that this disparity gave rise to an appearance that the suppression of speech was based on the identity or perceived viewpoint of the speaker, particularly because the transportation authority did not even attempt to articulate a neutral justification for the disparate treatment. *See id.* at 11. In contrast, the Attorney General here has not distinguished among speakers by disparately applying a facially neutral provision. On their face, the regulations restrict the promotion of tobacco products, regardless of brand or manufacturer, and permit nonpromotional speech relating to tobacco products by any speaker, tobacco manufacturers and sellers included. The companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions. Under these circumstances, we do not see the danger of viewpoint

discrimination that was present in *AIDS Action Committee*,[8] and we decline to impose a higher level of review on such basis.

In declining to impose a more searching review than that mandated by *Central Hudson*, we are aware of the recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification. *See, e.g., Greater New Orleans Broad. Ass'n*, 527 U.S. at 184, 119 S.Ct. 1923 ("[C]ertain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech."). Nevertheless, it is not our role to anticipate changes in well-established constitutional doctrines. *See Buzynski v. Oliver*, 538 F.2d 6, 7 (1st Cir.1976) ("Although there are circumstances in which it is appropriate for a court of appeals to disregard the teachings of earlier Supreme Court decisions, generally the Supreme Court has the exclusive authority to overrule its decisions." (citation omitted)). We are therefore bound to apply the *Central Hudson* test, as is, to this case.

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[8] Notwithstanding the tobacco companies' cries of mistreatment, the context in which the Massachusetts regulations were promulgated simply does not compare to that surrounding the suppression of speech in *AIDS Action Committee*. In that case, the suppression was directed at a group advocating sexual health practices, particularly with regard to AIDS--an issue that evokes deep feelings and often prejudices in our society. Furthermore, the suppression of speech in *AIDS Action Committee*, which was done with no contemporaneous explanation of reasons or basis, also came after a previous ad campaign had provoked public complaints which included a substantial display of homophobia. *See AIDS Action Committee*, 42 F.3d at 3. We found those particular circumstances to give rise to a presumption of viewpoint discrimination, but we did not suggest that ordinary commercial speech regulations, such as those at issue in this case, would give rise to a similar presumption absent comparable circumstances, which are simply not present here.

2. The Central Hudson Test

In *Central Hudson* Gas & *Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court summarized the four-part analysis used to determine the constitutionality of governmental restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must [1] concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Under this analysis, the government bears the burden of identifying a substantial interest and justifying the challenged restriction. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 183, 119 S.Ct. 1923. Mindful that the four prongs of the analysis are "to a certain extent, interrelated," *id.*, we will consider them *seriatim*.

a. *Nonmisleading Speech Concerning Lawful Activity*

Although the Attorney General is unwilling to entirely concede that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity, he was willing to assume that much for the purposes of summary judgment. We therefore need not explore this prong of the analysis.

b. *Substantial Interest*

The second prong of the *Central Hudson* test requires that the state identify a substantial state interest underlying the challenged regulations. Several such interests have been identified by the Attorney General.

The first state interest proffered by the Attorney General is the Commonwealth's desire "to eliminate deception and unfairness in the way [tobacco products] are marketed, sold and distributed in Massachusetts." 940 C.M.R. §§ 21.01, 22.01. Leaving aside for now whether such interest is served by the regulations, we have no doubt that it is a substantial state interest. Indeed, the state interest in protecting consumers from false and misleading commercial information was the original justification for a more permissive First Amendment analysis in the commercial speech area. *See, e.g., Central Hudson*, 447 U.S. at 563-64, 100 S.Ct. 2343.

The next state interest identified by the Attorney General is the Commonwealth's aim "to address the incidence of [tobacco] use by children under legal age." 940 C.M.R. § 21.01; *see also id.* § 22.01. This general state interest is subdivided in the briefs into two distinct, but related, interests. First, the Attorney General asserts a state interest in ensuring compliance with state law, which prohibits the sale of tobacco products to minors, and we consider that interest substantial. Second, the Attorney General relies on the state's interest in protecting the health of children from the negative effects associated with the use and abuse of tobacco products, which is also substantial.

The tobacco companies argue that Massachusetts cannot have a substantial interest in depriving consumers of truthful information in a paternalistic effort to protect them by "keeping them in the dark." We certainly agree with this proposition insofar as it relates to adult consumers, in which circumstance the First Amendment mandates that the consumer, rather than the government, judge the value of the information being communicated. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503-04, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). However, the courts have consistently recognized that the government may act more protectively where children are concerned. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on

communicative materials available to youths than on those available to adults."); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir.1996) (citing cases in support of the proposition that "children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media"). Where, as here, the state acts to protect minors, its substantial interest is not vitiated by the admittedly paternalistic nature of its regulation.

c. *Whether the Regulations "Directly Advance" the State's Interests*

A great deal of the written and oral argument submitted in this case has concerned the third prong of our *Central Hudson* analysis--whether the Massachusetts regulations "directly advance" the Commonwealth's interests. After a careful review of the record, we hold that the regulations satisfy this prong of our inquiry.

The Supreme Court has recently emphasized that the government's burden regarding this third prong of the *Central Hudson* analysis

> "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Consequently, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."

Greater New Orleans Broad. Ass'n, 527 U.S. at 188, 119 S.Ct. 1923 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), and *Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343). The companies and the Attorney General dispute both whether the harms recited by the Commonwealth are real and whether the regulations will alleviate them to a material degree. Although the two aspects of the inquiry are closely interrelated in this case, we address

them separately for the sake of convenience and, hopefully, clarity.

i. *Real Harms*

Like so many contentious issues in the law, the dispute over whether the harms cited by the Attorney General are "real" is in part a dispute over the level of generality at which the inquiry itself should be made. The Attorney General, adopting a broader perspective, urges that the record and common sense amply support his contention that there is a problem with underage tobacco use, in the United States generally and in Massachusetts in particular. The Attorney General further asserts that this problem of underage tobacco use is substantially related to, and thus may be materially alleviated by restrictions upon, advertising. The tobacco companies, on the other hand, urge a more narrow perspective. They argue that the Attorney General has failed to demonstrate a teen cigarette smoking problem in Massachusetts, and that he certainly has shown no problem with underage consumption of smokeless tobacco or cigars. Furthermore, the companies charge, to the extent that there may be a problem with tobacco use by minors, the record does not establish any connection between such underage use and the types of indoor and outdoor advertising and promotion restricted by the regulations. The Attorney General's principal response to the companies' emphasis on product-specific analysis, which response was accepted in large part by the district court, is that the three types of tobacco products subject to the regulations pose similar health concerns and similar dangers in the way they are promoted, and thus may and should be regulated pursuant to one common scheme.

First of all, we have some difficulty accepting the Attorney General's suggestion that "what is good for cigarettes is good for cigars," at least in the First Amendment context. To accept such a proposition could conceivably open the door to unforeseen and unjustified speech regulation on the mere theory that products are related or share ingredients. On the other hand, of course, the Attorney General need not offer separate

justifications for regulation of green and red M & M's, to give an exaggerated example, and our commercial speech doctrine must allow the legislative and executive branches to make reasonable economies in their regulation of comparable products. However, we need not decide today whether, and under what circumstances, a "regulation by association" scheme might be acceptable in the commercial speech context, because we find that the Attorney General has offered sufficient product-specific evidence regarding cigarettes, smokeless tobacco, and cigars to demonstrate that the dangers posed by underage use of each is a "real harm" and that the regulations can be reasonably expected to alleviate those harms to a material degree.

Before addressing the product-specific information presented by the Attorney General, however, we do note that he is not the first to recognize that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, --- U.S. ----, ----, 120 S.Ct. 1291, 1315, 146 L.Ed.2d 121 (2000). After conducting the most extensive rulemaking procedure in history, the Food and Drug Administration promulgated regulations not unlike those issued by the Attorney General. See 61 Fed.Reg. 44619-45318. Although the Supreme Court recently struck down the FDA regulations because it found that the agency did not have authority to regulate tobacco products, the Court explicitly emphasized "the seriousness of the problem that the FDA has sought to address" and stated that the agency had "amply demonstrated" its significance. *Brown & Williamson*, --- U.S. at ----, 120 S.Ct. at 1315. At this level of generality, we feel that the risk of harm posed by tobacco use, and particularly by underage tobacco use in this country, is established beyond reasonable dispute. Again, we need not decide whether this alone satisfies the "real harm" aspect of the "directly advances" prong, however, because the Attorney General has provided us with additional information to support his view that underage use of cigarettes, smokeless tobacco products, and cigars poses a real danger to the Commonwealth of Massachusetts.

i(A). Cigarettes

The Attorney General's case is strongest against cigarettes, which have become emblematic of the health risks associated with tobacco use in this country. In his summary judgment papers and in his submissions to this Court, the Attorney General refers at length to precisely the kinds of studies and summaries of statistical and anecdotal evidence accepted by the Supreme Court to justify commercial speech restrictions. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-28, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) ("[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" (citations omitted)); Affidavit of Michael G. Hering and exhibits thereto, Joint Appendix at 1184-3087. These submissions are replete with evidence that smoking, particularly by minors, poses a significant risk to the public health and is a widespread practice. *See, e.g., U.S. Dep't of Health & Human Servs., Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), Joint Appendix at 1203, 1223 ("Cigarette smoking during childhood and adolescence produces significant health problems among young people, including cough and phlegm production, an increased number and severity of respiratory illnesses, decreased physical fitness, and unfavorable lipid profile, and potential retardation in the rate of lung growth and the level of maximum lung function."); Massachusetts Dep't of Pub. Health, *Adolescent Tobacco Use in Massachusetts: Trends Among Public Schools Students 1984-1996* (1997), Joint Appendix at 2272, 2281. As such, they are more than sufficient to demonstrate that the harm cited by the Attorney General is a real one.

i(B). Smokeless Tobacco

The makers of smokeless tobacco products present two principal arguments for why, even assuming that Massachusetts could justify its regulation of cigarettes, the use of smokeless

tobacco products does not present a comparable problem. First, the smokeless tobacco producers argue that the vast majority of the information relied upon by the Attorney General to justify the regulations concerns cigarettes specifically and not smokeless tobacco. Second, they point to studies indicating that, whatever national trends may exist, smokeless tobacco consumption by minors has actually decreased in Massachusetts during recent years. We address these arguments in turn.

The smokeless tobacco producers are correct that the Attorney General has been able to garner more information on the use and negative effects of cigarettes than of other tobacco products. However, the Attorney General does point to various sources specific to smokeless tobacco, including the relevant parts of the FDA regulations struck down but factually accepted by the Supreme Court in *Brown & Williamson*, as well as independent published studies. *See, e.g.*, Choi et al., *Does advertising promote smokeless tobacco use among adolescent boys?- Evidence from California*, Joint Appendix at 2516. Furthermore, the state's brief sets forth substantial anecdotal evidence detailing the highly successful marketing of smokeless tobacco to young consumers beginning in the late 1960s and early 1970s. Of course, the companies object that this data is dated and that it does not specifically evaluate the impact of outdoor advertising such as that principally targeted by the Massachusetts regulations, but we think that such objections demand more than *Central Hudson* requires. The Attorney General has adequately demonstrated that smokeless tobacco consumption by underage users poses a real danger.

The companies' second point is that the Massachusetts Department of Health study upon which the Attorney General largely relies actually shows a sharp decline in the use of smokeless tobacco by young people in Massachusetts between 1993 and 1996, in which time such use fell from 8.0 percent to 4.5 percent. *See* Mass. Dep't of Pub. Health, *Independent Evaluation of the Massachusetts Tobacco Control Program*, Joint Appendix at 3752. Although we understand the

companies' frustration at increased regulation while current efforts seem to be bearing fruit, we do not think that partial successes in fighting underage smokeless tobacco use robs the Commonwealth of its authority to remedy what remains of the problem. Even according to the study emphasized by the smokeless tobacco makers, a not-insignificant number of minors continues to use smokeless tobacco products in Massachusetts, and nothing submitted by the companies contradicts the Attorney General's evidence that this remaining use poses a significant health risk to those users, now and as they age. We therefore conclude that the Attorney General has satisfied this aspect of his burden with regard to smokeless tobacco products.

i(C). Cigars

The cigar makers largely echo the first argument pressed by the smokeless tobacco makers above--that the Attorney General impermissibly relies on studies and anecdotal evidence concerning cigarette smoking to justify regulation of cigars. Again, we find that the state has presented sufficient evidence to support its conclusion that underage cigar smoking constitutes a real harm.

The Attorney General relies heavily on a monograph published by the National Cancer Institute in 1998. See National Cancer Inst., Monograph 9, *Cigars: Effects and Trends* (1998), Joint Appendix at 2572. As that study sets forth in more detail, cigar smoking presents a serious risk of disease, comparable in type and severity to that attributed to cigarette smoking. *See id.* at 2588. The study also concludes that the "data on cigar use among adolescents is also alarming," referring specifically to Massachusetts for evidence of "a substantial level of cigar use, even prior to high school." *Id.* at 2598. We think that this evidence weighs very heavily in the Attorney General's favor.[9]

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[9] The study also sheds light on the FDA's decision to not regulate cigars when it regulated cigarettes and smokeless tobacco in 1996, abstention much touted by the cigar companies in their briefs. According to the monologue,

The Attorney General also relies on anecdotal evidence of the successful advertising campaign waged by smokeless tobacco in the 1960s and 1970s (mentioned above) and a similar successful campaign by cigarette manufacturers in the 1940s and 1950s. He argues that these advertising campaigns have demonstrated a willingness and an effectiveness on the part of tobacco producers in the use of "image-related" advertisements to stimulate tobacco markets, and that minors are particularly susceptible to this type of advertising. The companies argue that this anecdotal evidence is dated and cannot establish a link between youth cigar smoking and advertising, particularly not the kind of advertising at issue here. Once again, we think that the standard urged by the tobacco companies demands more than is required by *Central Hudson* and its progeny. The Attorney General has sufficiently demonstrated that cigar use among minors poses a real danger in Massachusetts.

ii. *Whether the Restrictions Will Alleviate the Cited Harms to a Material Degree*

The second aspect of the third prong of the *Central Hudson* analysis is also hotly disputed by the parties. The tobacco companies argue that the Attorney General has failed entirely to demonstrate that advertising causes underage smoking or that advertising restrictions of the type at issue here will have any effect on underage tobacco use, much less result in a material reduction. The companies pointedly attack the studies submitted by the Attorney General and assert that several of those very studies decline to assert a cause-effect relationship between advertising and smoking. The Attorney General responds with a common sense argument on the causal relationship between advertising and product use, supported by a number of studies and anecdotal evidence demonstrating at least a correlation between advertising and tobacco use in

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data on youth cigar usage was largely unavailable until recently. *See Cigars: Effects and Trends*, Joint Appendix at 2598.

general and among children in particular. We think that the Attorney General has carried his burden.

The "common sense" argument asserted by the Attorney General--that advertising has some cause-effect relationship with consumption--is not a novel one. Indeed, the Supreme Court recognized in *Central Hudson* itself that "[t]here is an immediate connection between advertising and demand." 447 U.S. at 569, 100 S.Ct. 2343. More recently, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), the Court found it "assuredly a matter of 'common sense' that a restriction on advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait." *But see Greater New Orleans Broad. Ass'n*, 527 U.S. at 189, 119 S.Ct. 1923 ("While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another."). After all, the five leading cigarette manufacturers spent approximately $5.66 billion on advertising and promotion in 1997, and nearly $300 million on outdoor advertising alone. See Federal Trade Comm'n, *Report to Congress for 1997*, Joint Appendix at 2544. It would defy common sense to conclude that for-profit corporations which have demonstrated their ability to survive and flourish in the market would pour such tremendous resources into advertising without at least some calculation that their efforts would have a substantial effect on consumption of their product. As a general proposition, we think that common sense does support the Attorney General's position.

The Attorney General, however, does not rest on common sense arguments alone. He cites myriad sources to support his proposition that tobacco advertising and tobacco use are causally related, including notably a Surgeon's General's report concluding that "cigarette advertising appears to increase young people's risk of smoking," *see* U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A*

Report of the Surgeon General (1994), Joint Appendix at 1203, and the FDA's extensive investigation and finding that "advertising plays a material role in the decision by those under 18 to use tobacco products," *see* 60 Fed Reg. 44466 (1996), Joint Appendix at 1513. Nearly two thousand pages of the joint appendix in this case consist of reports and surveys by governmental, scientific, and academic entities submitted by the Attorney General in support of his dual proposition that tobacco use by minors poses a real risk and that tobacco advertising contributed materially to this problem.[10] Although we decline to summarize that material here, we have no difficulty concluding that it is sufficient to satisfy the Attorney General's burden of demonstrating that the restrictions will alleviate the harm caused by underage smoking to a material degree.

The smokeless tobacco and cigar manufacturers also repeat the argument that the majority of the materials submitted by the Attorney General concern primarily or exclusively cigarettes, and that such materials cannot justify restrictions on smokeless tobacco and cigar advertisements. We agree that the cigarette regulations are the supported most abundantly, in terms of the sheer size of record submitted by the Attorney General. That, however, is not determinative. The product-specific information submitted by the Attorney General, taken in conjunction with the other statistical and anecdotal information presented, is sufficient to carry his burden. *See Florida Bar*, 515 U.S. at 626-28, 115 S.Ct. 2371.

Finally, the cigar manufacturers argue that the Massachusetts regulations cannot reasonably be expected to reduce cigar consumption in Massachusetts, because the

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[10] To be sure, the companies have presented studies in which no correlation or causal relationship was found between advertising and tobacco use. They also are critical of several of the studies cited by the Attorney General. However, the fact that there may exist differences of opinion on this issue is insufficient to deprive Massachusetts of its ability to enact regulations based on a well-founded conclusion that advertising restrictions will reduce tobacco use among young people.

advertising of cigars is nearly nonexistent in comparison with the pervasive promotion of cigarettes. For instance, the cigar makers do not use any billboards in Massachusetts, and they spent only $50,500 on outdoor advertising in the entire United States during 1997, compared to the nearly $300 million spent by the leading cigarette manufacturers in that year. While this argument is a forceful one, it fails to persuade us that the regulations are unjustified. Although the regulations will necessarily have a small impact on the amount of existing advertising (because relatively little exists), they will remove any outdoor advertising that does currently fall within 1000 feet of a school or playground, thus protecting those particular children. As the Attorney General has demonstrated, children exposed to tobacco advertising near their schools and play areas are likely to be affected by its message. Although fewer children will be affected by cigar advertising, simply because there is much less of it, the relative lack of current cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small. We cannot conclude that, under these particular circumstances, the First Amendment bars the Attorney General from regulating cigar advertising of the type targeted here, especially when we consider that he has done so as part of a rational and well-founded comprehensive tobacco regulatory scheme.

In sum, we conclude that the Attorney General has carried his burden of demonstrating that the regulations will "directly advance" his goals of reducing both underage tobacco use and tobacco sales to minors.[11] Less advertising may reasonably be expected to reduce the consumption of tobacco products by current users, insofar as there will be fewer reminders to stop at the store to pick up a pack of cigarettes, a can of smokeless tobacco, or a cigar (at least on the way to and from schools and

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[11] We are not persuaded that the regulations further the state's interest in prohibiting the dispersion of false and misleading information to consumers. However, because the other interests identified by the Attorney General are directly advanced, this failure does not require invalidation of the regulations.

playgrounds, where Massachusetts has focused its efforts). Moreover, the restrictions on advertising should reduce the number of new or future users by reducing the visibility of tobacco products to minors, by dispelling the advertising-encouraged notion that tobacco products are pervasive and form part of the "good life," and by eliminating the psychological incentives to tobacco use presented by things as simple as attractive ad color and design (aspects of advertising which we agree may reasonably be assumed to have greater effect on young people). Because the Attorney General has submitted sufficient data to demonstrate the harms posed by underage tobacco use and to support his view that the regulations will diminish underage tobacco consumption in both of these ways, we conclude that he has satisfied his burden under prong three of the *Central Hudson* analysis.

d. *The Regulations Do Not Restrict More Speech than Necessary*

The fourth and final prong of the *Central Hudson* analysis requires that the government not restrict more speech than necessary to achieve its purposes. *In Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court explained that this is not a "least restrictive means" standard. Summarizing its holding, the Court stated:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends"--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served;" that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480, 109 S.Ct. 3028. We hold that the Massachusetts advertising regulations satisfy this requirement.

The companies' first argument that the Massachusetts regulations are not sufficiently tailored to satisfy the First Amendment is that, although the regulations facially apply only to areas within 1000 feet of a school or playground, the actual effect of the regulations is to prohibit virtually all advertising in as much as ninety percent of the land area of Massachusetts' three largest metropolitan areas, Boston, Worcester, and Springfield. Although this is certainly a valid point (even the Attorney General concedes that the reach of the regulations is substantial), it does not vitiate the tailoring of the speech restrictions in this case. While the amount of land within 1000 feet of a school or playground may be substantial, its sheer size cannot defeat the obvious connection to the state's interest in protecting minors, which is served directly by limiting application of the regulations to areas near schools and playgrounds--areas where children are more likely to be. We also find no indication that the Attorney General adopted the 1000-foot rule as a proxy or pretext for a more general ban on tobacco advertising, in the Commonwealth's largest metropolitan areas or elsewhere in the state. Under the circumstances, we do not think that the substantial geographical reach of the regulations violates the First Amendment.

The companies also challenge the 1000-foot rule itself, arguing that it is both arbitrary and overly extensive. However, the Supreme Court in *Fox* explicitly noted "the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[d] the Legislative and Executive Branches needed leeway" in fashioning effective but proportionate commercial speech regulations. *See Fox*, 492 U.S. at 480, 109 S.Ct. 3028. The Attorney General based his 1000-foot determination primarily on the FDA's implementation of a comparable rule in its 1996 regulations, which, as noted, followed an extensive rulemaking procedure. Such reliance on the conclusions of a

lengthy federal investigation should hardly be called arbitrary. Furthermore, it is worth noting that the industry has voluntarily refrained from billboard advertising within 500 feet of schools since 1990, which suggests that they recognize the value of such restrictions in principle. The contention that 500 feet is acceptable but that 1000 feet is somehow arbitrary strikes us as splitting hairs, particularly because this type of determination is generally better suited for legislative and executive decisionmakers than for the courts; in any event, it is a greater judicial second-guessing than is appropriate under the *Central Hudson* analysis for commercial speech restrictions. In the end, one thousand feet--a mere three city blocks--does not strike us as an unreasonable distance in which to assume that minors present at or on their way to or from schools and playgrounds would be most affected by outdoor advertising. Whether or not it is a perfect "fit," it is a reasonable one, and that is what is required by *Central Hudson* and *Fox*.

Oddly enough, the district court struck down the 1000-foot boundary in the context of indoor advertising, concluding that the Attorney General had offered no basis for it other than the FDA regulations, which themselves did not restrict indoor ads. The Attorney General has appealed this aspect of the district court's decision, and we reverse, largely for reasons mentioned in the previous paragraph. It is hardly unreasonable for the Attorney General to determine that stores within 1000 feet of schools and playgrounds--that area where children are most likely to be present--will also be more likely to receive minors as customers. In fact, we do not doubt that the companies would have challenged the rationality of the Attorney General's regulatory scheme if it did not include restrictions on advertisements at the point of sale. We do have some misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level, but we find that such determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment. In any event, the burden on speech imposed by

the provision is very limited (there are no restrictions whatsoever on advertising above the five-foot level, so long as it is not visible from the street), and we find the compromise to be narrowly tailored and a reasonable "fit." *Fox*, 492 U.S. at 480, 109 S.Ct. 3028.

The tobacco companies' next argument is that the Attorney General may not regulate commercial speech when there exist several reasonable alternatives that would restrict no or less speech. In particular, the companies argue that Massachusetts should be required to more stringently enforce current laws prohibiting tobacco sales to minors, and perhaps make tobacco use itself illegal for minors, before restricting tobacco advertising and promotion. We are not persuaded by this line of argument in this case. First, Massachusetts has not chosen speech restrictions as its first or only punch in its fight against underage tobacco use. To the contrary, the Commonwealth is widely considered a leader in many aspects of tobacco regulation. *See, e.g., Center for Disease Control, Best Practices for Comprehensive Tobacco Control Programs* (Aug.1999), Joint Appendix at 684 (referring throughout to Massachusetts as a leader in tobacco control). Although the companies question this characterization, they offer no evidence to the contrary, nor do they offer any persuasive evidence that the state is neglecting to conscientiously and vigorously enforce its current laws. Second, in light of *Fox*, we do not think that Massachusetts should be required to criminalize underage tobacco use before it can regulate tobacco advertising around its schools and playgrounds. There are legitimate reasons why the state may not want to make underage tobacco use a crime; after all, the state's motivation is to protect children, not to institutionalize them. Third, the principal function of advertising is to propose a commercial transaction, in this case the sale of tobacco products--which, where minors are concerned, is already illegal in Massachusetts. And finally, while criminalization of underage tobacco use or possession (or stricter enforcement of existing laws, for that matter) might reduce the amount of current tobacco use, it is unlikely to serve the government's

interest in reducing the demand for tobacco products among young people. The advertising regulations, in contrast, can reasonably be expected to reduce demand. For all of these reasons, we conclude that Massachusetts need not exhaust yet more alternatives in its ongoing efforts to curb underage tobacco use before restricting commercial speech in the targeted way that it does with the regulations.

The next area of dispute between the parties concerns the alternative modes of communication left open to tobacco manufacturers and retailers. The Attorney General emphasizes that the regulations do not restrict advertising and promotion in print media, such as newspapers and magazines. The tobacco companies, in response, note that tobacco advertising is already prohibited from television and radio.[12] They also point out that, while newspaper and magazine advertising may be a viable alternative for major manufacturers and some large retailers (as evidenced in part by the prevalence of cigarette and cigar ads in magazines), such media are cost-prohibitive for many vendors of tobacco products such as small groceries and convenience stores. These smaller vendors of tobacco products, the companies argue, are left without any reasonable alternative means for communicating with the public.

Although we find this argument quite a strong one, it does not require invalidation of the regulations because it does not vitiate the narrow tailoring of the restrictions on speech. After all, only businesses within 1000 feet of a school or playground--the area reasonably determined by the Attorney General to present the greatest exposure to minors--will be affected by the regulations. And even within those areas, the regulations as written explicitly permitted retailers to display so-called "tombstone" signs. *See* 940 C.M.R. § 21.04(6). These signs would have allowed retailers to communicate to legitimate

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[12] Congress prohibited such advertising of cigarettes and little cigars in 1971, *see* 15 U.S.C. § 1335, and of smokeless tobacco products in 1986, *see* 15 U.S.C. § 4402(f).

consumers the availability of tobacco products, albeit less forcefully than larger, more colorful advertising. Unfortunately (for tobacco sellers), the district court found this aspect of the regulations preempted by the FCLAA, and the Commonwealth has not appealed that ruling. We nevertheless are of the view that this compromise established by the regulations, as written, is indicative of the kind of "calculation" by the Attorney General that the First Amendment requires of government when it seeks to restrict commercial speech. *See* Fox, 492 U.S. at 480, 109 S.Ct. 3028. And, although the striking of the tombstone exception measurably increases the burden on tobacco sellers (or rather removes an alleviating factor),[13] we cannot conclude that this vitiates the reasonable fit otherwise established by the regulations.

Finally, the tobacco companies suggest that the regulations are not sufficiently tailored because they deny communication to a large number of adults for the sake of protecting children. However, the cases referred to by the companies, such as *United States v. Playboy Entertainment Group, Inc.*, --- U.S. ----, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), do not support their position. First, each of those cases dealt with expressive speech, rather than commercial speech, and therefore applied a "strict scrutiny" standard to invalidate the laws, rather than the intermediate scrutiny applicable to commercial speech cases. Furthermore, even in that context, the Court held that "the objective of sheltering children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."

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[13] We do note that, even under the district court's decision, which was premised on the content-based nature of the tombstone provision, the Commonwealth remains able to promulgate a new exception provision that does not dictate the content of a small information sign communicating to legitimate customers the availability of tobacco products, if the Commonwealth so desires.

Playboy Entertainment Group, --- U.S. at ---- - ----, 120 S.Ct. at 1886-87 (emphasis added); *see also* Reno, 521 U.S. at 874, 117 S.Ct. 2329 ("[The law's] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."). Here, although the geographical scope of the advertising restrictions is substantial, we do not find the restrictions equivalent to a "blanket ban" on speech. Furthermore, it is difficult to imagine how Massachusetts might effectively shield children from tobacco advertising near schools and playgrounds without incidentally burdening adult communication in that area as it does. The regulations themselves address this problem by providing an exception for indoor advertising in any establishment that excludes minors, *see* C.M.R. § 21.04(5)(b), as well by the very fact that the advertising restrictions are focused on areas where children are most likely to be present. Consequently, we think that the burden imposed on adult commercial communication within the 1000-foot perimeter is not so great as to render the regulations invalid under *Central Hudson*.

3. Conclusion

In conclusion, we hold that the advertising restrictions imposed by the Massachusetts regulations do not violate the First Amendment. The regulations directly advance the substantial interests identified by the Attorney General, and their restrictions on commercial speech are proportionate to the state's purposes. As the Supreme Court has stated, "[w]ithin those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480, 109 S.Ct. 3028.

C. First Amendment Challenge to Restrictions on Retail Practices

The manufacturers of smokeless tobacco and cigars also challenge the restrictions imposed by the Massachusetts regulations on the use of "self- service" displays as a retail

outlet practice. *See* 940 C.M.R. § 22.06. The district court held that this practice is not protected by the First Amendment because it does not constitute speech. Although the issue is by no means an easy one, we agree and affirm.

On appeal, the tobacco companies argue that self-service displays are "a specialized mode of speech" that communicates information to the consumer and proposes a commercial transaction in much the same way as does advertising. Although we accept the tobacco companies' proposition that self-service displays often do have some communicative commercial function (covered as they often are in logos and other advertising mechanisms), the actual restriction imposed by the regulations is not on speech, but rather on the physical location of actual tobacco products. A familiar analogy illustrates this point. If sellers are so inclined, we see nothing in the regulations prohibiting them from displaying empty tobacco product containers in display cases, so long as no actual tobacco product is so displayed. In that circumstance, just like at the local video store, the consumer can peruse the relevant commercial information at his or her leisure before approaching the sales counter to make an actual purchase. For the vast majority of tobacco products, nearly all of which are distributed in sealed packaging which the consumer may not open and inspect before purchase, we think that this type of regulation poses no cognizable burden on speech, and any secondary imposition is surely so narrow as to be justified by the significant interests served by the regulations.

We do recognize that the sale of higher-end cigars poses a somewhat different circumstance. According to the cigar manufacturers, cigar retailers traditionally allow consumers pre-purchase access to cigars so that the consumer may make his or her selection on the basis of a number of objective and subjective factors including the aroma and feel of the cigar. Unlike the distribution of packaged cigars and little cigars, this specialized retail practice would in fact be burdened by prohibitions on self-service displays, and would implicate

Central Hudson scrutiny if the First Amendment applies to such a retail practice.

However, we need not decide whether this particular form of self-service retail practice constitutes commercial speech protected by the First Amendment, because the regulations pass muster under *Central Hudson* even assuming *arguendo* that the commercial speech analysis applies. For the reasons set forth at length above, we conclude that the Attorney General has adequately demonstrated the substantial nature of the state's interests, as well as the general proposition that restrictions on advertising and promotion may reasonably be expected to directly advance those interests. It is apparent that limiting self-service displays and placing tobacco products behind the sales counter will aid in the Commonwealth's efforts to curb the sale of tobacco products to underage consumers and directly advance the state's goals. Finally, the regulations are more than sufficiently tailored to the goals of the regulation, not only because they leave open retail schemes such as those used by video stores, but also because the prohibition on self-service displays does not apply to "[s]elf-service displays that are located within adult-only retail facilities." 940 C.M.R. § 22.06(3)(c). A tobacco specialty store can therefore avoid any burden presented by the regulation by simply closing the store to children, who cannot lawfully purchase tobacco products in any event. We find the fit between ends and means to be very reasonable, and we therefore conclude that the restrictions on self-service displays are constitutional.

D. Challenges to the Cigar Warnings Requirements

In addition to their challenges to the restrictions on advertising, promotion, and self-service displays, the cigar companies also challenge the warning scheme created by the Massachusetts regulations. Under that scheme, all packages and advertising of cigars must include a warning stating (1) that cigar smoke contains carbon monoxide and nicotine or (2) that cigars are not a safe alternative to cigarettes. *See* 940 C.M.R. §§ 22.04- 22.05. The warnings must occupy twenty-five percent of

the front or top panel of the package (whichever is larger) and twenty percent of any advertisement, *see id.* §§ 22.04(2), 22.05(2), although that area may be used for any federal, state, or local warning so long as the Massachusetts warning remains clear and conspicuous, *see id.* § 22.04(2)(c). The use of a pre-printed sticker affixed to the package or advertisement constitutes compliance. *See id.* § 22.04(2)(b).

1. First Amendment Claim

The cigar companies' first argument posits that the warnings requirements violate the First Amendment. The district court rejected this argument, and we affirm for substantially the reasons set forth in the lower court's opinion. *See Lorillard II*, 84 F.Supp.2d at 197-98.

At the outset, we note that warnings schemes similar to that imposed by the Massachusetts regulations have been repeatedly sustained by the courts. *See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-53, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). Furthermore, the cigar warnings were specifically designed to "fill the gap" in federal law, which requires similar warnings for cigarettes and smokeless tobacco products but not for cigars; this federal scheme has been in place since 1965 and its validity is well established.

As the Supreme Court made clear in *Zauderer*, there are "material differences between disclosure requirements and outright prohibitions on speech," 471 U.S. at 650, 105 S.Ct. 2265, such that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," *Id.* at 651 n. 14, 105 S.Ct. 2265. Therefore, although the commercial speech analysis applies, the Supreme Court has held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651, 105 S.Ct. 2265.

On appeal, the cigar companies do not challenge the substantiality of the state's interest in informing consumers of the health risks associated with cigar smoking. Nor do they dispute that the regulations are reasonably related to that interest. Rather, the companies assert that the regulations are nevertheless unconstitutional because the very size of the required warnings (twenty-five percent of the main panel of packaging or twenty percent of advertising) "unduly burdens" speech. *Cf. id.* at 651, 105 S.Ct. 2265 ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.").

With respect to the packaging requirements, the companies argue that the warnings are unconstitutional because the Attorney General failed to prove that the Commonwealth's purposes could not be equally well served by warnings covering only, for example, ten percent of the front of top panel of the package. This argument, however, was explicitly rejected by the Supreme Court in *Zauderer*, where the Court declined to apply a "'least restrictive means' analysis" to disclosure requirements and stated: "[W]e do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Id.* at 651 n. 14, 105 S.Ct. 2265. Because the packaging requirements are reasonably related to a substantial state interest and do not unduly burden interstate commerce, they are valid.

With regard to the advertisement warning requirements, the companies argue that the twenty-percent coverage of the warnings will so burden cigar manufacturers that they will cease advertising altogether. The companies offer precious little to support this difficult-to-believe proposition, and we find it unpersuasive. Other industries, including the manufacturers of cigarettes and smokeless tobacco products, have successfully incorporated warning schemes into their advertising practices, and cigars present no special considerations that lead us to

believe a different result will ensue here. Similar to the restrictions upheld in *Zauderer*, Massachusetts "has not attempted to prevent [cigar makers] from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650, 105 S.Ct. 2265. As such, the advertising restrictions do not violate the First Amendment.

2. Commerce Clause Claim

Finally, the cigar companies claim that the cigar warning requirements imposed by the regulations unduly burden interstate commerce in violation of the Commerce Clause. We agree in part.

a. Advertising Requirements

Section 22.05 of the regulations makes it unlawful "for any persons to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the advertising bears one of the warning statements ... and the warning statement ... comprises 20% of the area of the advertisement and is in the format required." As the district court, appellants, and the Attorney General all apparently agree, this language applies, on its face, to advertisements in national magazines sold in Massachusetts as well as to advertising on the Internet if viewed from an Internet terminal in Massachusetts. The district court, although recognizing the burden on interstate commerce that would result from a plain reading of the regulation, adopted a narrow interpretation under which § 22.05 did not apply to national magazines and Internet advertising, and upheld the regulation. While we agree with the district court's evaluation of the burden that would result from a facial application of the regulation, we think that the provision is not fairly susceptible to the narrowing construction, and we find that it unduly burdens interstate commerce.

The Supreme Court summarized the standard for evaluating nondiscriminatory state regulations on commerce in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d

174 (1970): "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The warning requirements, as they apply to advertisements, satisfy the first inquiry of the *Pike* analysis uncontroversially: informing consumers of the health risks associated with cigar consumption is unquestionably a legitimate local public interest. However, even accepting the Attorney General's further position that any effect on interstate commerce is only incidental, the resulting burden on interstate commerce is clearly excessive, even in relation to the Commonwealth's strong interest in informing consumers of health risks.

The plain language of the regulations, which makes it unlawful to "cause to be advertised" cigar products in Massachusetts, imposes liability on manufacturers for advertising in national magazines that are distributed in the Commonwealth, as well as for advertising on the Internet which can be viewed from a terminal in Massachusetts.[14] As the district court recognized, this "would place a great burden on interstate commerce since it would require the Massachusetts Warning to be carried by a national magazine in order to ensure that any copies ending up in Massachusetts carry the Warning." *Lorillard II*, 84 F.Supp.2d at 203. The court also concluded that "the Commonwealth's local interest in capturing national magazines [and Internet media] is outweighed by the burden it would place on interstate commerce." *Id.* We agree with this evaluation of the burden imposed by the regulations, and we similarly conclude that in this respect § 22.05 runs afoul of the *Pike* analysis.

The district court, however, endeavored to save the regulations from invalidation by adopting a narrow

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[14] On their face, the regulations arguably impose liability on the print and Internet media, as well.

interpretative gloss to avoid the constitutional problems posed by a facial reading. With little if any support in the language of the regulations, the court held that they would not apply to magazines of truly national distribution, unless the magazine had a regional or Massachusetts version, nor to Internet media. *Id.*

Although federal courts may in some circumstances adopt a "narrowing construction to which the law is fairly susceptible," *Rhode Island Assoc. of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 36 (1st Cir.1999), the courts must also take care not to trample the legislative or executive province of state authorities by making unduly substantive additions or changes to laws and regulations. As the companies point out, the district court's interpretative gloss may pose its own problems and ambiguities, such as the determination of whether a magazine is "truly national" in scope. We also are skeptical of the court's reasoning that Internet advertisements are not "within" Massachusetts; although we understand the court's point, and appreciate the difficulties inherent in regulation of speech in "cyberspace," the plain language of the regulations covers a person or entity that advertises on any Internet site viewable from a terminal in Massachusetts. Most important, there is simply no basis in the language or history of § 22.05 to support the narrow reading of the district court. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (rejecting narrowing interpretation where, *inter alia*, "the ordinance by its plain terms is not susceptible to a narrowing construction"). In sum, although there can be no easily and brightly demarcated line between proper narrowing construction and judicial overreaching, we conclude that the regulations are simply not "fairly susceptible" to the district court's narrowing interpretation. *Rhode Island Assoc. of Realtors*, 199 F.3d at 36.

We therefore hold that the warnings requirements for advertising are unconstitutional. Although appropriate intrastate application of these or similar restrictions may be permissible,

§ 22.05 does not lend itself to judicial parsing, and we leave it to the Attorney General, if he so wishes, to craft a constitutional warnings requirement for media and other cigar advertising.

b. *Packaging Requirements*

The cigar companies also challenge the provision making it unlawful to "manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or manufactured little cigar the package of which does not bear" the required warning. 940 C.M.R. § 22.04(1). As all parties seem to agree, this language imposes liability on a manufacturer whenever one of its cigars appears in Massachusetts without the required warning, even when the sale is conducted by third parties without the knowledge or consent of the manufacturer. We think that this provision burdens interstate commerce in an impermissible manner.

As an initial matter, we would note that we do not find *Pike* problems with the Attorney General's labeling scheme in general. Similar warnings are required on a range of products by a number of states, *see, e.g.*, California Health & Safety Code § 104550 (cigar labels and warnings); Ala. Code § 8-19-5(23) (making it unlawful to affix a required revenue stamp to improperly labeled cigarette packages); New York Alcoholic Beverage Control Law § 107-a (authorizing and governing state labeling scheme for alcoholic beverages), and the burden on manufacturers and retailers of requiring state-specific packaging, while significant, does not generally outweigh the benefits of informing the public of serious health issues. We generally agree with the Attorney General that the companies' interest in the efficiency of a uniform national labeling system cannot override the Commonwealth's substantial interest in protecting its citizens. Although it might not be ideal for the companies to have to coordinate all Massachusetts distribution through a central point to affix labels, this option certainly would give the manufacturers adequate room within which to maneuver, without imposing any undue burden on interstate commerce.

However, there is one aspect of the regulations that renders them unduly burdensome, and that is § 22.05's imposition of liability for third party action. As mentioned above, the regulations impose liability on the manufacturers for every import, sale, or distribution of an improperly labeled package in Massachusetts, even when the sale or distribution is made by a third party unconnected with the manufacturer, such as a mail-order seller in another state or any other distributor, wholesaler, or retail seller that sells cigars to Massachusetts consumers independent of the manufacturer. Under this scheme, the manufacturers may not safely label only those packages intended for Massachusetts; instead, to protect themselves against liability for conduct totally without their control, the manufacturers have no choice but to include the Massachusetts warnings on all packages, just in case one should later appear in Massachusetts through unforeseen channels. This harsh practical effect of the regulations stands in sharp contrast to all other warnings schemes of which the Court is aware, which typically impose liability on the ultimate seller, thus containing the law's effect intrastate and also allowing all affected parties to take the necessary precautions to comply with the law and avoid substantial liability. In this respect, we conclude that the benefit derived from the regulations is clearly outweighed by the substantial burdens placed on interstate commerce.

Unlike the advertising requirements, the labeling provisions are not easily susceptible to parsing of what is constitutional and what runs afoul of the Commerce Clause. Therefore, although we would find many aspects of the package labeling provisions to pass constitutional muster, we must invalidate them in their entirety and leave it to the Attorney General to reformulate them, if he so desires, in a manner consistent with this decision and the Constitution. We therefore hold 940 C.M.R. § 22.04 to be unconstitutional and without effect, except insofar as it provides the warnings and format specifications required in 940 C.M.R. § 22.05.

III. Conclusion

For the reasons set forth above, we hold that the Massachusetts regulations are not preempted by federal law, do not violate the First Amendment, and do not violate the Commerce Clause except for 940 C.M.R. § 22.04 and § 22.05. The judgment of the district court is

Affirmed in part, reversed in part.

APPENDIX B

No. Civ.A. 99-11118-WGY.
UNITED STATES DISTRICT COURT
District of Massachusetts.

LORILLARD TOBACCO CO., R.J. Reynolds Tobacco Co., Philip Morris Inc., Brown & Williamson Tobacco Corp., and United States Tobacco Co.,
Plaintiffs,

v.

Thomas REILLY, in his official capacity as Attorney General of Massachusetts
Defendant.

December 2, 1999.

MEMORANDUM AND ORDER

YOUNG, Chief Judge.

I. INTRODUCTION

Although admittedly addictive, *see* Philip Morris, Cigarette Smoking: Health Issues for Smokers (visited Nov. 16, 1999) <http:// www.philipmorris.com/tobacco_bus/tobacco_issues/health _issues.html> ("Cigarette smoking is addictive, as that term is most commonly used today."), cigarette smoking is an entirely lawful activity for adult Americans. Congress' efforts to regulate the tobacco industry are candid half-measures, seeking both to confront the public health impact of smoking by weaning the public away from its addiction to cigarettes and, at the same time, to preserve an important industry until foreign outlets can be found for its products. *Cf.* Susan M. Marsh, *U.S. Tobacco Exports: Toward Monitoring and Regulation Consistent with Acknowledged Health Risks*, 15 Wis. Int'l L.J. 29 (1996); Andrea J. Hageman, *U.S. Tobacco Exports: The Dichotomy Between Trade and Health Policies*,

1 Minn.J. Global Trade 175 (1992); National Security and International Affairs Division, U.S. General Accounting Office, Report to Congressional Requestors: Trade and Health Issues: Dichotomy Between U.S. Tobacco Export Policy and Antismoking Initiatives (1990). The present case tests whether Massachusetts' more aggressive regulation of the tobacco industry comports with the free speech guarantees of the United States Constitution and the governing federal statutes. The particular issue presented by the present motion asks whether a particular federal statute pre-empts, i.e., trumps, a particular regulation of the Massachusetts Attorney General (the "Attorney General").

On January 22, 1999, the Attorney General promulgated regulations (the "Regulations") that render certain types of tobacco product advertising and promotion "unfair or deceptive acts or practices" under Mass.Gen.Laws ch. 93A, § 2(a). *See* Mass.Gen.Laws ch. 93A, § 2(c) (1999). The Regulations, which become effective on February 1, 2000, essentially outlaw (i) advertisements visible from areas likely to be frequented by minors, and (ii) certain promotional techniques that purportedly invite illegal tobacco use by minors. Several tobacco product manufacturers, namely Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, and United States Tobacco Company (collectively, the "Tobacco Companies"), seek a declaration that the Regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq. (the "Act"). Since there are no material facts in dispute concerning this issue, the Tobacco Companies filed the instant motion for summary judgment seeking a declaration that the Regulations are void as matter of law. The Attorney General, in turn, asks for summary judgment declaring that the Regulations are not pre-empted by the Act.[1]

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[1] The Attorney General has not filed a motion for summary judgment. In his opposition, however, he correctly points out that there are no factual issues in dispute and "respectfully requests that the Court both deny the

II. THE REGULATIONS

The Tobacco Companies contest several of the Regulations promulgated by the Attorney General under the title "Sales and Distribution of Cigarettes and Smokeless Tobacco Products in Massachusetts," 940 C.M.R. § 21.00 et seq. The stated purpose of the Regulations, which effectively make certain practices unlawful under Mass.Gen.L. ch. 93A,

> is to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age. 940 CMR 21.00 imposes requirements and restrictions on the sale and distribution of cigarettes and smokeless tobacco products in Massachusetts in order to prevent access to such products by underage consumers.

940 C.M.R. § 21.01. Although the Regulations contain a variety of prohibitions, the Tobacco Companies contest only five specific provisions. Together, these provisions outlaw the following three practices:

(i) tobacco product advertising visible from the outdoors located within a 1,000 foot radius of public playgrounds, playground areas in a public park, elementary school or secondary school ("outdoor advertising"), *see id.* § 21.04(5)(a);

(ii) point-of-sale tobacco product advertising placed below five feet from the floor in stores accessible to minors

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plaintiffs' Motion for Summary Judgment and enter summary judgment for the Attorney General." Def.Opp.Mem. at 4 n. 4. *See National Expositions v. Crowley Maritime Corp.*, 824 F.2d 131, 133 (1st Cir.1987) ("[A] district court has the legal power to render 'summary judgment ... in favor' of the party opposing a summary judgment motion 'even though he has made no formal cross-motion under rule 56.'" [quoting Wright, Miller & Kane, *Federal Practice and Procedure* § 2720 (1983)]).

within a 1,000 foot radius of public playgrounds, playground areas in a public park, elementary school or secondary school ("ground-level advertising"), *see id.* § 21.04(5)(b); and,

(iii) tobacco product promotional techniques such as sampling, promotional give-aways, distribution of tobacco products through the mail, and offering gifts other than tobacco products in consideration of purchase without age verification ("promotional techniques"), *see id.* § 21.04(1)(a), (b), (d).

At the same time, the Tobacco Companies also contest a regulation that permits retailers to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here' on the outside or visible from the outside of each location where such products are offered for sale," ("tombstone advertising"). *Id.* § 21.04(6).

III. THE ACT

As amended by Congress in 1969, the Act requires federal health warnings to appear in a conspicuous place on every package of cigarettes sold in the United States. *See* 15 U.S.C. § 1331 et seq. Of special relevance here, section 5(b) of the Act includes an express pre-emption provision:

> *No requirement or prohibition based on smoking and health* shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id. § 1334(b) (emphasis added). Prior to the 1969 amendment, the pre-emption provision stated:

> No *statement relating to smoking and health* shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334 (1965) (emphasis added). The Tobacco Companies argue that the general language used in the current pre-emption provision, as compared to the language of the original provision, demonstrates a Congressional intent to preclude state advertising legislation that is at all related to smoking and health.

IV. PRE-EMPTION GENERALLY

Under the Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, a state law that conflicts with or violates federal law is without effect. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819). Pre-emption analysis, however, "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).[2] Accordingly, "the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). The "historic police power of the States" includes restrictions on the size and placement of outdoor advertisements. *See St. Louis Poster Adver. Co. v. City of St. Louis*, 249 U.S. 269, 274-275, 39 S.Ct. 274, 63 L.Ed. 599 (1919). Moreover, prior to the passage of the Act, the Supreme Court held a Utah statute banning the outdoor advertisement of cigarettes valid under the police power. *Packer Corp. v. Utah*, 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1932). Accordingly, in determining the outcome of the case at bar, the presumption against pre-emption figures prominently. *See Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 77 (1st Cir.1997) (noting importance of presumption against pre-emption in considering state regulation of tobacco products).

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[2] The presumption against pre-emption applies even when analyzing an express pre-emption clause such as section 5 of the Act. *See California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 331-32, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).

V. PRE-EMPTIVE EFFECT OF THE ACT

The First Circuit recently stated that the "central inquiry" in determining the pre-emptive scope of the Act is whether or not the "predicate legal duty" created by the Regulations "constitutes a (1) requirement or prohibition . . . imposed under state law, (2) based on smoking and health, (3) with respect to the advertising or promotion of any [properly labeled] cigarettes." *Philip Morris*, 122 F.3d at 69-70 (holding that Act did not pre-empt Massachusetts statute requiring tobacco product manufacturers to disclose additives and nicotine-yield ratings of their products to the Commonwealth). As all parties before this Court agree that the Regulations are prohibitions imposed under state law respecting the advertising or promotion of properly labeled cigarettes, the key disputed issue is whether the Regulations *create* a predicate legal duty "based on smoking and health."[3]

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[3] In *Cipollone*, the Supreme Court examined whether various state common law claims asserted by a decedent's estate were preempted by the Act. For each common law claim, the Supreme Court considered whether the "legal duty that is the *predicate* of the common-law damages action" was based on smoking and health. *Cipollone*, 505 U.S. at 524, 112 S.Ct. 2608 (emphasis added). Here, arguing that "[t]he legal duty *underlying* the challenged regulations is the general duty set forth in M.G.L. c. 93A, § 2(a) not to engage in unfair or deceptive acts or practices," Opp.Mem. at 8 (emphasis added), rather than a duty based on smoking and health, the Attorney General attempts to convince the Court to apply the *Cipollone* predicate duty test to hold that the Act does not preempt the Regulations. Although this is an interpretation the First Circuit could have drawn from *Cipollone* in the context of statutory pre-emption, it declined to do so. Instead, when the First Circuit considered whether the Act preempted a tobacco-related state statute, as is basically the issue here, the court chose to "modify" the *Cipollone* test and focus on whether the legal duty *"created by"* or *"imposed"* by the statute was based on smoking and health. *Philip Morris*, 122 F.3d at 70 (emphasis added). Consequently, the extensive back-and-forth between the parties concerning the purpose *underlying* the Regulations is irrelevant. Rather, the somewhat confusing notion of a "predicate" duty created by the Regulations is nothing more than the duty that they impose.

VI. WHAT ARE DUTIES "BASED ON SMOKING AND HEALTH?"

Five Circuit Courts have recently considered what types of state advertising regulations impose duties "based on smoking and health." Most recently, in *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir.1999), the Ninth Circuit ruled that a Pierce County resolution that banned outdoor advertising was pre-empted.[4] The Second Circuit, in *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2nd Cir.1999) found some portions of a New York City Local Law prohibiting most outdoor advertising of tobacco products in certain locations pre-empted.[5] In *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir.1999) the Seventh Circuit held not pre-empted under the Act a Chicago municipal ordinance that bans almost all publicly visible cigarette advertising.[6] Similarly, in *Penn Adv. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir.1995), *vacated*, 518

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[4] The resolution considered in *Lindsey* banned all outdoor advertising that could be seen from the street except advertisements presented in a "tombstone format." *Lindsey*, 195 F.3d at 1067. "No tombstone advertisement [could] be displayed, however, if it [were] visible from a school, school bus stop, bus stop, or sidewalk regularly used by minors to get to school or within one thousand feet of a school, playground, or public park." *Id.* at 1067-1068.

[5] The New York City Local Law in *Giuliani* prohibited outdoor advertising within one thousand feet of any school building, playground, child day care center, amusement arcade or youth center, or indoor advertising in the same areas if it can be seen from the street. *See Giuliani*, 195 F.3d at 103. "There is one exception to the ban: a single, black-and-white, text-only 'tombstone' sign stating, 'TOBACCO PRODUCTS SOLD HERE,' may be placed within ten feet of an entrance to a store where tobacco products are sold." *Id.*

[6] The ordinance considered in *Federation* permitted advertising "near highways ... at certain sports facilities ..., inside stores licensed to sell ... cigarette products ..., on commercial vehicles transporting such products, and signs identifying the premises where such products are sold." *Federation*, 189 F.3d at 634-35.

U.S. 1030, 116 S.Ct. 2575, 135 L.Ed.2d 1090 (1996), *on remand*, 101 F.3d 332 (4th Cir.1996), the Fourth Circuit ruled that a Baltimore ordinance prohibiting outdoor cigarette product advertising in certain areas of the city was not pre-empted.[7] By contrast, in *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (1994), the Second Circuit held pre-empted under the Act a New York City ordinance requiring one public health message to be displayed for every four tobacco advertisements displayed on city-licensed property.[8] In resolving the instant case, this Court relies heavily on each decision's analysis.

A. Purpose of the Act

According to the Supreme Court, the pre-emptive scope of the Act "is governed entirely by the express language in § 5[and] there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608. If limited to the vague language of section 5(b), i.e., "based on smoking and health," this Court might conclude (as do the Tobacco Companies) that the clause outlaws *any* state law enacted due to "health concerns about smoking." Pl.Mem. at 8. But despite the Supreme Court's mandate to rely "entirely" upon the express language of section 5(b), *Cipollone* proceeded to examine the Act's "structure and purpose" to delineate its pre-emptive impact, emphasizing that the "purpose" of the Act is

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[7] In *Penn Advertising*, the challenged ordinance permitted "such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes including professional sports stadiums" and contained "an exception permitting such advertising in certain commercially and industrially zoned areas of the City." *Penn Advertising*, 63 F.3d at 1321.

[8] The ordinance struck down in *Vango Media* invited the public to submit proposed health messages and required the Department of Health to select for publication, at the expense of tobacco product advertisers, those "it deem[ed] to communicate most effectively the health risks of tobacco product use or the health benefits of not using tobacco products." *Vango Media*, 34 F.3d at 70.

"the *ultimate* touchstone of preemption analysis." *Cipollone*, 505 U.S. at 516, 112 S.Ct. 2608 (emphasis added). Following the lead of the Supreme Court, the First, Second, and Seventh Circuits have looked beyond the language of section 5(b) and examined other sources to discern the purpose of the Act's pre-emption clause. *See Philip Morris*, 122 F.3d at 77 ("[W]e find the explicit preemption language and legislative history [of the Act] insufficient to clear[ly] and manifest[ly] overcome the presumption against preemption of a state's traditional powers to legislate for the health and safety of its citizens."); *Federation*, 189 F.3d at 637 ("[W]e must examine the congressional scheme and legislative history of § 5[b] in order to determine what Congress meant...."); *Giuliani*, 195 F.3d 100, 106 ("Congress has provided valuable insight into the intended scope of preemption....").

There are "two important manifestations of congressional intent that shed light on the scope of § 5(b) preemption...." *Federation*, 189 F.3d at 638. First, specifically with respect to pre-emption, the Act expressly states its purpose is to prevent "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any *relationship between smoking and health*." 15 U.S.C. § 1331 (emphasis added). Second, the relevant Senate Report states that section 5(b) is "narrowly phrased" and "in no way affect[s] the power of any State ... with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*." S.Rep. No. 566, 91st Cong., 2d Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663 (emphasis added). The "purpose" and "ultimate touchstone" of section 5(b), therefore, is Congress' desire to prevent states from enacting regulations that create a "danger of interfering with the [Act's] advertising and labeling requirements." *Federation*, 189 F.3d at 639; *see also Vango Media*, 34 F.3d at 74 (recognizing that Act's purpose is "to avoid diverse, non-uniform, and confusing labeling and advertising regulations with respect to any relationship between smoking and health."). Congress simultaneously intended to protect the states' inherent

police powers to regulate smoking. *See Philip Morris*, 122 F.3d at 77. Thus, to hold that the Act pre-empts any state advertising regulations enacted due to "health concerns about smoking" would significantly aggrandize Congress' stated purpose in enacting section 5(b) by leaving states essentially powerless in this area. *See Federation*, 189 F.3d at 638 ("Any other approach leads to results that we cannot believe Congress intended.").[9]

B. Location-Based Restrictions

Since the pre-emptive reach of section 5(b) falls short of invalidating *all* state restrictions on tobacco product advertisements, the question becomes "How far short?" The *Giuliani, Federation*, and *Penn Advertising* courts have held that certain location-based restrictions are not "based on smoking and health." See *Giuliani*, 195 F.3d at 108 (upholding portions of local law that "restrict only the physical placement

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[9] The Tobacco Companies contend that the two mentioned indicators of legislative purpose are overshadowed by the following statement made by Senator Magnuson, the Senate manager of the Conference Report, during final Senate floor debate:

> Mr. Cooper: Mr. President, I wish to ask the Senator from Washington, the manager of the report, questions for interpretation. As I understand the conference report, it preempts the States from *any action restricting advertising*.
>
> Mr. Magnuson: *Yes*.

116 Cong. Rec. 6640 (1970) (emphasis added). Although Senator Magnuson's response to a formal request for interpretation should be accorded significant weight, *see* N. Singer, *Sutherland Statutory Construction* § 48.14 (5th ed.1992), this Court refuses to read the simple one-word affirmative reply as suggesting a total prohibition of *any* state restrictions on tobacco product advertisement. Even the Tobacco Companies state that Senator Magnuson's response only "made clear that [Congress] reserved to the federal government the exclusive authority to regulate cigarette advertising and promotion *based on health concerns about smoking* ...," Pl. Mem. at 8 (emphasis added), not "any action restricting advertising." This Court's analysis prescinds from this more narrow interpretation of the Senator's response.

of tobacco advertising signs in a manner akin to a run of the mill zoning regulation"); *Federation*, 189 F.3d at 639 (upholding portion of ordinance that "regulates the location and type of [tobacco product] signs"); *Penn Advertising*, 63 F.3d at 1324 (upholding ordinance that "simply restrict[s] the location of cigarette-advertising signs, irrespective of the nature of the message communicated."). Even though the ordinances upheld in *Giuliani*, *Federation*, and *Penn Advertising* focus solely on the advertisement of tobacco products, the courts concluded that allowing states to enact restrictions that are admittedly triggered by the mention of tobacco products, but merely limit location and placement, does not interfere with the federal advertising and labeling scheme concerning the relationship between smoking and health. Likewise in the instant case, although the provisions of the Regulations that outlaw outdoor and ground-level advertising here similarly target only tobacco product advertisements, they do not implicate the relationship between smoking and health. Rather, they "simply restrict the location of cigarette-advertising signs, irrespective of the nature of the message communicated." *Penn Advertising*, 63 F.3d at 1324. Accordingly, this Court holds that the location-based restrictions are not pre-empted by the Act.

C. Restrictions Relating to Messages About Relationship Between Smoking and Health

Like the *Federation* court, the Second Circuit in *Vango Media* recognized that the purpose of Section 5(b) is "to avoid diverse, nonuniform, and confusing labeling and advertising regulations with respect to any relationship between smoking and health." *Vango Media*, 34 F.3d at 74. Adhering to that purpose, the court struck down a municipal ordinance requiring advertisers to carry a specific message about the health benefits of not using tobacco products. *See id.* at 74-75. The court reasoned that the effect of the ordinance "would be to educate the public as to the adverse health risks of smoking ...," *id.* at 73, and resulted in "regulations respecting the relationship between smoking and health," *id.* at 70. *Vango Media* thus

stands for the simple proposition that the Act pre-empts state legislation that specifically requires or prevents the advertisement of a message concerning the relationship between smoking and health. According to the purpose of the Act, such legislation is "based on smoking and health." This conclusion is supported most recently by the Second Circuit's decision in *Giuliani* which found pre-empted the tombstone provision of the Local Law at issue. *See Giuliani*, 195 F.3d at 108.

In the case at bar, the only portion of the Regulations that in any way requires or prevents the advertisement of a relationship-based message is the tombstone advertising provision. Although the provision is permissive, where it applies it prevents the Tobacco Companies from carrying any messages whatsoever about the relationship between smoking and health, even those permitted or required under the Act. The Act pre-empts such regulation.

Although the Tobacco Companies argue that the tombstone provision thus renders the Regulations invalid in their entirety, this Court does no more than strike out 940 C.M.R. § 21.04(6) according to the Regulations' severability clause, leaving the remaining provisions intact. *See* 940 C.M.R. § 21.06. Like the *Federation* court's consideration of brand-specific advertisement restrictions, this Court concludes that the Office of the Attorney General "would not have regarded the problematic provision as a necessary component of its handiwork." *Federation*, 189 F.3d at 640.

D. Content-Regulating Restrictions Unrelated to the Relationship Between Smoking and Health

As part of the holding in *Federation*, the Seventh Circuit held pre-empted one provision of the relevant municipal ordinance that "permits advertising, without any location consideration, that is limited to a generic, as opposed to brand-specific, mention of a tobacco product." *Federation*, 189 F.3d at 640. Reasoning that the provision "purports to regulate the content of some advertising without regard to any land-use

consideration," the court ruled that that particular aspect of the ordinance "runs squarely into the prohibition of the current § 5(b)...." *Id.* So too here, argue the Tobacco Companies, pressing for judgment on pre-emption grounds without regard to the more knotty First Amendment issues.

This Court concludes, however, that the express pre-emption issue in *Federation* can be supported, of course, on the ground that the particular aspect of the ordinance there considered prevented advertisers from including required or permitted messages about the relationship between smoking and health. *See* discussion *supra* part VI.C. The purpose of the Act illustrates that section 5(b) pre-empts state legislation that regulates tobacco product advertisements by requiring or restricting the inclusion of content *only* when that regulation concerns the relationship between smoking and health. The fact that a state tobacco advertising regulation has content implications simply does not require the conclusion that it is "based on smoking and health."

Unlike the restriction of brand-specific advertising struck down in *Federation*, the challenged provisions in this case that prohibit promotional techniques in the absence of age verification regulate the content of tobacco advertisements[10] in a way that *does not* address the relationship between smoking and health. The provisions instead essentially require the Tobacco Companies to include a message that informs

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[10] On their face, the provisions limiting promotional techniques appear to be merely restrictive of location and placement because such techniques are permissible with age verification. In practice, however, the only way to employ these techniques is to include statements in promotional materials that inform consumers about potential age verification. For instance, the only way for one of the Tobacco Companies to distribute cigarettes through the mail (one of the practices outlawed by the Regulations) would be to include a message that states, "Age Verification Required," and a description of the verification process. Forcing the Tobacco Companies to include such statements, rather than just limiting the forum in which they can practice certain advertising techniques, thus regulates content.

observers that smoking is illegal for minors. Such intervention is permissible under the Commonwealth's police power. *See* discussion *supra* part VI.A. The provisions outlawing minor promotional techniques without age verification are not pre-empted by the Act.

VII. CONCLUSION

Section 5(b) of the Act only pre-empts state tobacco advertising regulations that are "based on smoking and health." 15 U.S.C. § 1334(b). Considering the purpose of the Act, a regulation that is "based on smoking and health" is one that concerns the relationship between smoking and health. Thus, the Act pre-empts regulations that require an advertiser to make a statement concerning the relationship between smoking and health, like the ordinance in *Vango Media*, and those that prevent an advertiser from carrying required or permitted health-based statements, like the severed portion of the ordinance in *Federation*. Other state enactments that specifically target tobacco product advertising, even those that regulate content without implicating the relationship between smoking and health, are not "based on smoking and health."

Of the challenged Regulations in the case at bar, only the tombstone provision, 940 C.M.R. § 21.04(6), prevents the Tobacco Companies from making a statement concerning the relationship between smoking and health. Since the Office of the Attorney General would have enacted the remainder of the challenged Regulations even had it known that the tombstone provision was pre-empted, the Court simply severs the objectionable provision in accordance with 940 C.M.R. § 21.06.

The Court therefore GRANTS IN PART the Tobacco Companies' motion for summary judgment by declaring 940 C.M.R. § 21.04(6) preempted under the Act. With respect to the remaining portions of the challenged Regulations, however, the Court holds that they are not pre-empted and thus "GRANTS IN PART the Attorney General's cross-motion for summary

judgment."[11] These rulings address the narrow issue of federal pre-emption. The Court, in making these rulings, intends no intimation whatsoever concerning the First Amendment issues presented in this case.

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[11] United States Tobacco Company ("U.S. Tobacco,"), a manufacturer of smokeless tobacco, argues in a separate motion for summary judgment that the Regulations, as they apply to smokeless tobacco, are not severable from the allegedly preempted cigarette provisions. With respect to those provisions of the Regulations that the Court holds not pre-empted under the Act, the question of severability raised in U.S. Tobacco's motion need not be reached. As for the severability of the pre-empted tombstone provision, the Court agrees with U.S. Tobacco "that the Regulations apply indistinguishably to cigarettes and smokeless tobacco...." U.S. Tobacco Mem. at 1. Accordingly, with respect to smokeless tobacco products, the Court GRANTS IN PART U.S. Tobacco's motion for summary judgment declaring 940 C.M.R. § 21.04(6) pre-empted.

APPENDIX C

Nos. Civ.A.99-11118WGY,
Civ.A.99-11270WGY.

UNITED STATES DISTRICT COURT,
District of Massachusetts.

LORILLARD TOBACCO CO., R.J. Reynolds Tobacco Co., Philip Morris Inc., Brown & Williamson Tobacco Corp., and United States Tobacco Co.,
Plaintiffs,

v.

Thomas REILLY, in his official capacity as Attorney General of Massachusetts,
Defendant.

Consolidated Cigar Corp.; General Cigar Co., Inc.; Havatampa, Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc; Swedish Match North America, Inc; Swisher International, Inc.; and Tobacco Exporters International (USA) Ltd.,
Plaintiffs,

v.

Thomas Reilly, in his official capacity as Attorney General of Massachusetts,
Defendant.

January 24, 2000

MEMORANDUM AND ORDER

YOUNG, Chief Judge.

CIGARETTE ADVERTISING IS FUNCTIONAL PORNOGRAPHY

The metaphor is apt. Both are entirely legal. Both are spawned by and supported by multi-billion-dollar industries generating significant economic activity. While ostensibly clucking in disapproval, millions of adult Americans support each industry with considerable cash outlays yet seek to have the government teach our children to avoid that which so many of us eagerly purchase.

Both cigarette advertising and pornography are protected forms of speech, reaching out to offer messages or products desired by and legal for adults. At the same time we leave it to our government to seek to shield our children from both of these forms of speech, believing them to be either inherently corrupting (pornography) or an inducement (cigarette advertising) to engage in an activity unlawful for minors. This dichotomy in the way we try to administer our visual world — a dichotomy in which adults value certain forms of speech but at the same time wish to eliminate vulnerable children from the audience — lies at the center of this case.

PROCEDURAL POSTURE

Responding to concerns about the use of tobacco products by minors, the Attorney General of the Commonwealth of Massachusetts promulgated regulations on January 22, 1999 (the "Regulations") that render certain types of tobacco product advertising and promotion "unfair or deceptive acts or practices" under Mass.Gen.Laws ch. 93A, § 2(a). *See* Mass.Gen.Laws ch. 93A, § 2(c) (1999). The Regulations, which become effective on February 1, 2000, essentially prohibit advertisements visible from areas likely to be frequented by minors. A companion set of regulations places the cigar industry under advertising restrictions and label warning requirements for the very first time. *See* Mass.Regs.Code tit. 940, §§ 22.00-22.09, as amended Jan. 19, 2000. Several cigarette and smokeless tobacco product manufacturers, namely Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation and United States Tobacco Company (collectively,

the "Tobacco Companies"), seek a declaration that the Regulations are unconstitutional under the First Amendment. Several cigar manufacturers, namely Consolidated Cigar Corporation, General Cigar Company, Havatampa, John Middleton, L.J. Peretti Company, Swedish Match North America, Swisher International, and Tobacco Exporters International (USA) (collectively, the "Cigar Companies") join the Tobacco Companies in challenging the Regulations under the First Amendment and also bring a challenge on the basis of the Commerce Clause of the Constitution. The Commonwealth of Massachusetts, through its Attorney General Thomas F. Reilly (the "Attorney General"), also moves for summary judgment. Since there are no material facts in dispute concerning these issues, and the parties have filed cross-motions for summary judgment, a declaration as matter of law concerning the validity of the Regulations is in order.[1]

THE REGULATIONS

Encompassed by the legal challenges brought by the Tobacco Companies are regulations promulgated by the Attorney General under the title "Sales and Distribution of Cigarettes and Smokeless Tobacco Products in Massachusetts," (the "Tobacco Regulations"). 940 C.M.R. §§ 21.00-27.07. The Cigar Companies challenge the similar Regulations promulgated under the title "Sales and Distribution of Cigars in Massachusetts" (the "Cigar Regulations") 940 C.M.R. §§ 22.00-22.09.

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[1] This Court previously has held, by order of December 2, 1999, *see Lorillard v. Reilly*, 76 F.Supp.2d 124 (D.Mass.1999), that 940 C.M.R. § 21.04(6), the portion of the Regulation prescribing "tombstone advertising," is preempted by federal law. This Court did not address the corresponding Cigar Regulation, 940 C.M.R. § 22.06(6). As cigar advertising is not regulated by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1342, and the Cigar Companies have not, in any case, brought a motion based on preemption of 940 C.M.R. § 22.06(6), the "tombstone advertising" provision for cigars therein stands, subject to the resolution of the motions herein.

TOBACCO REGULATIONS–FIRST AMENDMENT CHALLENGES

The Tobacco Regulations

Neither the Tobacco Companies nor the Attorney General, for purposes of this motion, disputes the underlying goals of the Regulations in trying to curb underage smoking. The stated purposes of these regulations are to eliminate deception and unfairness in the way tobacco products are marketed and sold, in order to address the incidence of tobacco use by underage children. *See* 940 C.M.R. 21.01. The pertinent portions of the regulations render the following advertising practices an "unfair or deceptive act or practice":

> (a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
>
> (b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

940 C.M.R. § 21.04(5)

The Cigar Regulations contain an identical provision, respecting "cigars" and "little cigars," to which the same First Amendment analysis applies.[2] *See* 940 C.M.R. § 22.06(5).

First Amendment Issues

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[2] The Cigar Companies argue that their products deserve a different First Amendments analysis. The Court addresses this argument *infra*, section V.B.

The Standard of Review

Despite the arguable [illegible] of political or socially-useful content apart from product information, commercial speech has received First Amendment protection since the decision of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Challenges to advertising regulations are typically analyzed under the framework established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). That framework involves a four-part test:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343.

As a preliminary matter, the Tobacco Companies argue that a standard of review higher than that contained in *Central Hudson* should apply. *See* Pls.' Opp'n at 3. They argue that tobacco advertising that provides sale or brand information is not misleading or deceptive, does not incite children to smoke, and is already required to carry health warnings by operation of federal law. *See id.* In particular, the Tobacco Companies argue that their situation is analogous to that of the contraceptive advertiser in the case of *Carey v. Population Servs. Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), in which the Supreme Court held unconstitutional a New York state prohibition on any advertisement or display of contraceptives.

Notwithstanding the fact that the Tobacco Companies are advertising a legal commercial product, their analogy to *Carey*

is misplaced. Their closest companions are pornographers, not those offering reproductive services. *Carey* recognized that "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.* at 686, 97 S.Ct. 2010. Smoking, like pornography, a type of legal recreational consumption enjoyed by millions of adults, has no readily discernable social or health benefits remotely comparable to contraception. Although smoking and pornography are arguably an important part of certain social circles, the "right" to smoke cannot be said to implicate constitutional rights as fundamental as does the "right" to determine reproductive decisions. *Cf. Griswold v. Connecticut* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (recognizing the constitutional right to be free from unwarranted governmental intrusion into the decision whether to bear or beget a child). The right protected in the instant case is the right to free speech relating to generic commercial products. *Carey* thus suggests that a court look to the social benefits of the advertised product when designating a standard of review for commercial speech restrictions. This additional check protects socially- or politically-important products from being unconstitutionally regulated through the back-door of advertising restrictions.

Some forms of advertising are particularly susceptible to constitutional concerns. With respect to the advertising restrictions in *Carey*, the Supreme Court recognized that their "can be no contention that the regulation is 'a mere time, place, and manner restriction.'" *Carey*, 431 U.S. at 700, 97 S.Ct. 2010. Unlike the instant Tobacco Regulations, the regulations in *Carey* were "total suppression" of all advertising, and concerned "activity with which, at least in some respects, the State could not interfere." *Id.* (quoting *Virginia Pharmacy Bd.*, 425 U.S. at 760, 96 S.Ct. 1817). The Supreme Court thus recognized that advertising regulations directed toward a product whose actual availability itself implicates constitutional

protections may be subject to high scrutiny, especially when those advertising regulations are "total suppression." In consequence, the State cannot easily, by regulating advertising, skirt the constitutional protections implicit in the product itself by imposing a ban on advertising and, in subsequent litigation, label those restrictions as merely regulation of "commercial speech." The underlying double set of implicated rights could, in certain circumstances, trigger the heightened scrutiny sought by the Tobacco Companies, but the case at bar does not sufficiently resemble *Carey* to warrant that standard. The Tobacco Regulations concern place and manner. They regulate a product whose principal use, like pornography, is recreational.

Consistent with his obligation to the Constitution, the Attorney General has presented, as will be discussed *infra*, valid justifications to regulate tobacco advertising. In *Carey*, the Supreme Court dismissed any notions that a ban on contraceptive advertising was justified by the State's contention that advertisements would be "offensive and embarrassing" or that they would "legitimize sexual activity of young people." With regard to the latter point, it is true that the Supreme Court ruled that none of the advertisements could "even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" *Id.* at 701, 97 S.Ct. 2010, (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 [1969]). The Tobacco Companies claim a similar lack of incitement in their advertising.

Hoping to draw a parallel to the advertisers in *Carey*, the Tobacco Companies argue that their advertisements "merely state the availability of products and services that are not only entirely legal [citation omitted], but constitutionally protected." *Id.* The last phrase of this passage from *Carey* is the key: the underlying activity in *Carey* had *particular* Constitutional protection. The Supreme Court's earlier citation to *Brandenburg v. Ohio* supports this emphasis. In *Brandenburg*, the underlying activity concerned the right to assemble with

others in order to advocate action. *See Brandenburg*, 395 U.S. at 449, 89 S.Ct. 1827. The state law in *Brandenburg* criminalized certain instances of that behavior even in the absence of direct incitement, a law which obviously impacted on fundamental social and political freedoms. Smoking presents no such underlying constitutional concerns. Tobacco products are general, recreational, articles of commerce that are regulated and that may be regulated in many ways. The right to smoke exists only insofar as governments have allowed the products to be sold. The fact that cigarettes and other tobacco products are currently legal for adults does give rise to certain First Amendment constitutional rights to advertise those products, but those rights are completely delineated within the *Central Hudson* commercial speech framework. There is no compelling reason to apply a heightened standard.

First Amendment Analysis Under the *Central Hudson* Framework

Ultimately, in order for the Tobacco Regulations to be upheld against a First Amendment challenge, the Regulations must satisfy the four-part test expressed in *Central Hudson*. The first step of that analysis requires that the targeted speech qualify for constitutional protection. *See Central Hudson*, 447 U.S. at 566.

Legitimate commercial speech is entitled to constitutional protections, but commercial speech that incites illegal activity may not be protected. The Attorney General does not concede that the targeted advertising qualifies for protection, since it might be seen to induce illegal activity. He is content to pass on that issue now, however, and to ask this Court to determine whether the regulations may stand, under the assumption that the advertising is, indeed, qualified for protection. *See* Def.'s Mem. in Supp. at 5-6. Thus there are three remaining *Central Hudson* factors.

Governmental Interest

Massachusetts, through various legislative and regulatory initiatives, has expressed an interest in reducing the number of underage smokers. The Attorney General argues that this governmental interest in addressing the incidence of underage tobacco use is substantial enough to meet the second part of the *Central Hudson* test. The Fourth Circuit in *Penn Advert. of Baltimore v. Mayor and City Council of Baltimore*[3], found that promoting compliance with the state prohibition of the sale of cigarettes to minors was a substantial governmental interest under *Central Hudson*.

Attempting to support the contrary conclusion, the Tobacco Companies point to *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). In *44 Liquormart*, the Supreme Court found that a state ban on liquor price advertising was unconstitutional. That case does not inform this Court's analysis, however, because it concerned the imposition of a "vice" characterization of alcohol with respect to adult consumers. *See id.* at 513-14, 116 S.Ct. 1495. The Attorney General's intention here is to target the prevalence of an illegal activity — underage smoking — not to restrict information from reaching adult smokers or to place a "vice" label on smoking.[4] This Court agrees with the Fourth Circuit that a state has a substantial interest in promoting compliance

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[3] 63 F.3d 1318, 1326 (4th Cir.1995), *vacated* 518 U.S. 1030, 116 S.Ct. 2575, 135 L.Ed.2d 1090 (1996), *modified*, 101 F.3d 332 (4th Cir.1996), *cert. denied*, 520 U.S. 1204, 117 S.Ct. 1569, 137 L.Ed.2d 715 (1997).

[4] *44 Liquormart* is further distinguishable in that it involved a complete statutory ban on price advertising, a characteristic that appears to have concerned the Supreme Court greatly. *See id.* at 502, 504, 116 S.Ct. 1495. That point goes to the tailoring of the law, however, and not the initial question of governmental interest. The Supreme Court appears to have had no trouble in recognizing a state interest in reducing alcohol consumption, the stated purpose of the statute.

with one of its own valid laws.[5] The Commonwealth's interest in this case is substantial enough to meet the second prong of the *Central Hudson* test.

Directly Advancing the Government Interest

No governmental interest, however strong, can justify legislation that "misses the mark." The third prong of the *Central Hudson* test requires a showing that the challenged regulation directly advances the governmental interest asserted. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. This requirement may be satisfied by the submission of surveys, studies, and even anecdotal evidence. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627-29, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). In certain cases, even "history, consensus, and 'simple common sense'" can be used to support the finding that the regulation advances the governmental interest. *Id.* at 628, 115 S.Ct. 2371 (quoting *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992)).

The Attorney General cites cases finding a common-sense connection between promotional advertising and consumption. *See* Def.'s Mem. in Supp. at 8. He also cites reports of the Surgeon General, the Food and Drug Administration, and the National Academy of Sciences' Institute of Medicine specifically linking advertising exposure to underage smoking, *see id.* at 9, and relies upon many government, scientific, empirical, and academic reports that support the use of

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[5] This interest is particularly high where the goal is to protect children who may not be able to assess the nature of the messages contained in the advertising. *See Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir.1996), *vacated*, 517 U.S. 1206, 116 S.Ct. 1821, 134 L.Ed.2d 927 (for reconsideration in light of *44 Liquormart*), *on remand*, 101 F.3d 325 (1996) (reaffirming original ruling), *cert. denied*, 520 U.S. 1204, 117 S.Ct. 1569, 137 L.Ed.2d 714. Indeed, this is an area where tobacco advertising and pornography bear a striking similarity, as governments try to shield children from adult-targeted expression. *Cf. Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding law prohibiting sale of obscene materials to minors).

advertising restrictions to decrease youth smoking. *See id.* at 10-12. These submissions are more than sufficient under the *Central Hudson* analysis. "[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether." *Florida Bar*, 515 U.S. at 628, 115 S.Ct. 2371.

In *Penn Advertising*, the Fourth Circuit analyzed regulations similar to the ones here and ruled that there was a "logical nexus" between advertising restrictions and the interest in reducing underage smoking. 63 F.3d at 1326. The Tobacco Companies argue that they advertise to influence consumers' brand preference and to persuade consumers to change brands.[6] Common sense informs this Court, however, that tobacco advertising must play some logical role, even if not a primary one, in the total amount of smoking. By way of comparison, it is not unusual to see advertisements for products or services even though the advertiser has a de facto monopoly. For example, the familiar advertisements by DeBeers encouraging the purchase of diamonds can hardly be construed as intended to convince customers to change brands, because there are essentially no competing brands. *See* Anthony DePalma, *Diamonds in the Cold; New Canadian Mine Seeks Its Place in a DeBeers World*, N.Y. Times, Apr. 13, 1999, at C1 (noting the diamond "cartel's tight grip on the market"). Rather, the advertisements remind consumers of the represented benefits of

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[6] If true, the Tobacco Regulations ought not harm the industry as a whole, because all competitors will be equally restricted from certain forms of advertising. If the economic impact to the industry as a whole is negligible because advertising affects solely brand preference (and not total consumption), it begs the question why the tobacco industry would pursue costly litigation which only preserves for them the ability to woo customers from each other.

the product and encourage further purchases.[7] Studies, including those presented by the Attorney General, reach the same conclusion with more scientific precision. "[R]esearch has confirmed that 'tobacco advertising plays an important role in encouraging young people to [smoke].'" Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv.L.Rev. 1420, 1508 (1999) (quoting John P. Pierce, Lora Lee & Elizabeth A. Gilpin, *Smoking initiation by Adolescent Girls, 1944 Through 1988: An Association with Targeted Advertising*, 271 JAMA 608, 611 [1994]).

The Tobacco Companies challenge the sufficiency of the Attorney General's showing in several ways. They first argue that the studies upon which he relies were not submitted with sworn expert affidavits, are therefore inadmissible, and cannot support the *Central Hudson* analysis. *See* Pls.' Opp'n at 6. This evidentiary point is weak. The government reports are admissible as government documents. *See* Fed.R.Evid. 803(8)(c); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). As to the other reports, the *Central Hudson* inquiry centers on whether the government had a logical belief, when it crafted the regulation, that its regulation would directly advance its purpose.[8] *See Penn Advertising*, 63 F.3d at 1323. The government need not limit its legislative acts to those based only on evidence which would later be admissible at any potential trial. The existence of the studies demonstrates, from the point of view of the Commonwealth

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[7] This is particularly true of point-of-sale advertising, where consumers may be reminded to purchase an extra pack of cigarettes even if their original trip to the store was only for milk.

[8] In this sense, *Central Hudson* seems to remove such reports from classification as hearsay at all, since the reports are not submitted for the truth of their statements, but rather as evidence of the effect of those statements on the legislating body.

while legislating or regulating, a sufficient connection between advertising and youth smoking.

The Tobacco Companies next argue that the Attorney General has relied too much on common sense and reason to satisfy the third prong of *Central Hudson*. *See* Pls.' Opp'n at 7-8. They argue that brand advertising has the effect of reallocating demand among competing suppliers, and does not increase aggregate demand. They assert that the Attorney General's speculation that a restriction on advertising will lower primary demand is insufficient. The Attorney General has indicated, however, that the Regulations also promote the purpose of reducing the number of *current* underage smokers by lowering their exposure to advertisements. Thus a determination of whether primary demand, per se, is affected is not required, although it has been addressed *supra*.

Several studies, and common sense, show a link between advertising and smoking. The Regulations attempt to restrict advertising in and around the places most traveled by children. The Attorney General has thus shown, through both studies and common sense, that the Regulations will have a direct effect on underage smoking.

The remainder of the Tobacco Companies' attack on this prong consists of a challenge to the accuracy or conclusions of the studies themselves. *See* Pls.' Opp'n at 8. They assert that there is no evidence that advertising is the sole cause of underage smoking, and point out that many other factors influence a teenager to smoke. They cite weaknesses in the Attorney General's studies for the proposition that there is no conclusive proof that tobacco advertising causes people to smoke. Using these doubts as evidence of a lack of connection between advertising and smoking, the Tobacco Companies point out that in *Florida Bar*, the opponents to the regulation presented no data or evidence to contradict that presented by the government. Furthermore, they argue, a court is not free to speculate or choose among competing experts or to defer to the legislature in the absence of an adequate factual record. *See*

Pls.' Opp'n at 11. Here, however, unlike the *44 Liquormart* case to which Tobacco Companies cite, there is a solid body of research demonstrating a link between advertising and incidence of smoking. The Attorney General has reacted to that evidence in addressing the problem of underage smoking by targeting forms of advertising which are in proximity to children. The question that emerges is what level of evidence the Commonwealth would need in order to legitimate, under the Constitution, its legislative or regulatory decisions.

The government is not required to satisfy the causal relationship by a preponderance of the evidence. "The inquiry under *Central Hudson's* third prong — whether the regulation directly advances the stated interest — does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." *Anheuser-Busch*, 63 F.3d at 1313.

> If it appear to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met. [Citation omitted] The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true.

Penn Advertising, 63 F.3d at 1323.

This case is unlike those in which the government has failed to satisfy the third *Central Hudson* prong by failure to submit *any* credible evidence of direct advancement. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (government "did not offer any

convincing evidence"); *Edenfield v. Fane*, 507 U.S. 761, 770-1, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (not satisfied if based on "mere speculation or conjecture"). The Attorney General has provided substantial evidence showing that regulation of tobacco advertising would substantially advance its interest in curtailing underage smoking. This relationship satisfies the third prong of *Central Hudson*.

More Extensive Than is Necessary to Serve the Government Interest

The final part of the *Central Hudson* analysis requires the court to examine whether the challenged Regulations restrict speech in a manner that is more extensive than necessary to serve the governmental interest. *See Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. The fit need not be perfect, but it should be reasonable, something "short of a least-restrictive-means standard." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The Supreme Court has adopted, derived from "time-place-manner" restriction doctrine, a "narrow tailoring" standard in which the regulation should not burden substantially more speech than is necessary to further the government's legitimate interests. *Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 1932, 144 L.Ed.2d 161 (1999). This means "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quoting *Fox*, 492 U.S. at 480, 109 S.Ct. 3028). The Supreme Court is "loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478, 109 S.Ct. 3028.

The Attorney General argues that the Regulations are discrete and targeted because they apply only within 1000 feet of schools and playgrounds, and to low-level advertising inside stores. They do not affect other forms of advertising, such as direct mail or newspapers. They also do not resemble complete-speech regulations, which have failed this prong of *Central*

Hudson, involving complete bans on price advertising of alcohol or prescription drugs, or broad prohibitions on advertising by lawyers. *See, e.g., 44 Liquormart*, 517 U.S. at 484, 116 S.Ct. 1495; *Bates v. State Bar of Arizona*, 433 U.S. 350, 365, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Virginia Bd. of Pharmacy*, 425 U.S. at 770, 96 S.Ct. 1817.

The Attorney General also asserts that there are no obvious less burdensome alternatives to the challenged Regulations. He points out that there is already a large, sustained effort in Massachusetts to reduce the illegal purchase and use of tobacco by minors. This effort, however, has not significantly lowered the rate of underage tobacco use. *See* Def.'s Mot. at 18. The government believes that targeting the development and maintenance of the desire of children to use tobacco through the regulation of advertisements is a reasonable next step in trying to address the problem.

In response to these points, the Tobacco Companies first challenge whether a restriction on speech itself is narrowly tailored to suit the objectives, in light of alternatives. They point out that there is "a wide array of alternatives" that could be implemented instead of a restriction on speech. Those alternatives include more rigorous enforcement of illegal sales, licensing supervision, prohibiting the possession of tobacco by minors, educational programs, and counter-advertising. *See* Pls.' Opp'n at 13-16. Certain Supreme Court decisions have found persuasive weight in the existence of alternatives when deciding whether a law is narrowly tailored to suit governmental interest. *See Greater New Orleans Broadcasting*, 527 U.S. at _____, 119 S.Ct. at 1934 ("There surely are practical and nonspeech-related forms of regulation — including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements — that could more directly and effectively alleviate some of the social costs of casino gambling."); *44 Liquormart*, 517 U.S. at 486, 116 S.Ct. 1495

("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) ("if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable"). These cases are distinguishable, however.

In *Greater New Orleans*, the regulation prohibited advertising by private casinos, and thus, more severely impacted casinos run by non-Indians than those run by Indian tribes. The Supreme Court found that this kind of regulation, based on the identity of the owners or operators of the casino, was not tailored to the purpose of reducing the incidence of gambling. In *44 Liquormart*, the government banned the advertising of alcohol prices in an effort to promote temperance. There was no showing that other methods, such as a direct price increase, would not also have promoted temperance. Nor did the government show that the restriction would materially advance the government interest (the third prong of the *Central Hudson* test). In *Discovery Network*, the ordinance involved prohibited distribution of "commercial handbills" in order to remove certain news racks from city streets. This method of indirectly targeting certain newsstands did not suit the interest in "ensuring safe streets and regulating visual blight" in Cincinnati. Thus a more direct regulation concerning size, shape or location of the stands, rather than a ban on the stands based on the content of their materials, would be a far better fit.

The Attorney General has indicated, and it is undisputed, that numerous efforts are and have been underway to combat underage smoking. These include education, enforcement, and counter-advertising. *See* Def.'s Mot. at 18. They have been recognized as some of the leading programs in the country. *See* Def.'s Reply at 13. Although they have had some effect,

underage smoking still remains a problem in Massachusetts. Although these efforts could be expanded infinitely, the Attorney General has shown that advertisements have a relationship to underage smoking, making a regulation of that form of speech potentially sufficiently tailored to meet the government objective in satisfying Constitutional requirements. All he needs show is a reasonable "fit" to the underlying goal. See *Greater New Orleans Broadcasting*, 527 U.S. at ____, 119 S.Ct. at 1932.

There will always be alternatives to regulating speech. Almost any restraint made on speech could have, alternatively, a corresponding restraint on action that the speech is designed to curtail. This cannot mean that every social problem that can be addressed both by direct legislation controlling the act and by indirect legislation regulating the communication of information related to the act must be pursued by direct legislation regulating the underlying action to the point of exhaustion. It is up to the legislature to decide what combination of restraints best addresses its interest, so long as the restraint on speech is narrowly tailored to address that interest.

This Court is unpersuaded that the Commonwealth cannot, at all, use speech-targeting restrictions until a "myriad of alternatives" is tried and found wanting. In the context of underage smoking, that rule would delay the government in using what may very well be a most effective way to prevent teenagers from starting smoking and becoming addicted to nicotine. In light of the marginal success of all its various other initiatives, an initiative targeting advertising is capable of being narrowly tailored to the interest in reducing underage smoking. The question that remains, of course, is whether the Regulations are so tailored.

The Tobacco Companies argue that even if some restriction on their speech is permissible, the Attorney General's specific Regulations are more extensive than necessary. In particular, they claim the 1000-foot radius surrounding schools and playgrounds is too large, and the 5-foot restriction on indoor

advertising within that 1000-foot zone is illogical. See Pls.' Mot. at 18.

The Tobacco Companies submit affidavits showing that the zones envisioned by the challenged Regulations would cover between 87 and 91 percent of the land areas in the cities of Boston, Worcester and Springfield.[9] *See* Pls.' Mot. at 18 n. 19. This effectively bans nearly all outdoor advertising, and captures nearly all retail establishments in those cities.

The resulting dilemma should appear quite obvious. If the government were to expand this zone to an extremely large radius surrounding schools and playgrounds (let us say, for sake of argument, 5 miles), the zone would become meaningless. It might cover the entirety of the Commonwealth without acknowledging that it is a total advertising ban inherently achieving a different or additional governmental purpose. If the Attorney General claims to be protecting children from being encouraged to smoke, his Regulations must be in some way narrowly tailored to apply to the exposure of *children* to tobacco advertisements. Using the articulated legitimate government purpose of protecting children to uphold a regulation which effectively shields *everyone* from viewing tobacco advertising would be improper[10] and would seemingly violate the final prong of the *Central Hudson* test. The regulations must not "burden substantially more speech than necessary." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). The government must show, somehow, that the decision to choose 1000 feet as the target

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[9] The methodology of some aspects of this analysis is challenged by the Attorney General, *see* Def.'s Resp. at 17 n. 19, but the point remains that the restriction is extensive.

[10] The question of whether shielding all persons from viewing tobacco advertisements is a legitimate government interest properly addressed by the Regulations is not at issue in this case, and this Court declines to address it.

zone is narrowly tailored to effectuate the governmental purpose.[11]

At oral argument, the Attorney General agreed with the Tobacco Companies' speculation that the choice of a 1000-foot zone was based on tobacco billboard advertising restrictions developed by the Food and Drug Administration (the "Administration").[12] *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed.Reg. 41,334-335, 41,374 (1995) (to be codified at 21 C.F.R. § 897.30(b)) (proposed Aug. 11, 1995). The 1000-foot restriction derived originally from the Administration's proposed regulations on tobacco advertising is now rendered moot in Massachusetts by virtue of the settlement agreement reached in 1998 between the industry and 46 states.[13] The Tobacco Companies argue, and the Attorney General seemed not to disagree at oral argument,

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[11] Just prior to the release of this Memorandum and Opinion, this Court received a letter from the Attorney General indicating certain amendments to the Regulations. *See* Letter from William W. Porter, Jan. 19, 2000. The pertinent part of the amendments removes the text in 940 C.M.R. §§ 21.04(5)(b) and 22.06(5)(b) which reads "accessible to persons younger than 18 years old" and replaces it with "which is not an adult-only retail establishment." *See id.*, Attachment A. "Adult-only retail facility" (the Court assumes the mismatch is unintentional) is defined as "a facility where the retailer ensures that no person younger than 18 years old is present or permitted to enter at any time." This amendment clarifies the provision by replacing the vague word "accessible," and tailors the regulation by exempting establishments where children are unlikely to enter. It does not, however, address the issue of the permissible zone of regulation for all the establishments that are *not* "adult-only." The Court's concern regarding the 1000-foot zone continues.

[12] "[W]here we got the thousand feet quite simply is that's what the FDA determined." Tr. of Mot. Hr'g, Dec. 2, 1999 at 5.

[13] The settlement agreement resolved the lawsuit of *Massachusetts v. Philip Morris Inc. et al*, No. 95-7378-J (Sup.Ct.Mass.1998). As part of the settlement of that case, the Tobacco Companies are now contractually barred from billboard advertising.

that the 1000-foot restriction was based on the Administration's analysis of the visibility of large billboards. While it may be true that the Massachusetts settlement resulted in a "voluntary" ban of billboard cigarette advertising, an examination of the proposed federal regulations shows that the Administration contemplated *all* forms of outdoor advertising. The Massachusetts settlement may have rendered the applicability of that regulation moot with respect to *billboard* advertising, but the settlement does not narrow the intended scope of the contemplated federal regulations as expressed in the text of the regulation itself.

The text accompanying the Proposed Rule uses the general term "outdoor advertising". *Id.* at 41,315, 41,334, 41,357. Furthermore, the text of the proposed regulation itself explicitly includes many forms of advertising: "No outdoor advertising, including but not limited to billboards, posters, or placards, may be placed within 1,000 feet of any playground, elementary school or secondary school." *Id.* at 41,334-335, 41,374 (to be codified at 21 C.F.R. § 897.30(b)). The Administration notes that "[t]hese are places where children and adolescents spend a great deal of time and should therefore be free of advertising for these products. The agency believes that this [is] a reasonable restriction." *Id.* at 41334.

Of course, any numerical limit bears some degree of arbitrariness. It is not the role of the Courts to choose the proper number for the legislature in order to make the Regulations valid. The government must show it has narrowly tailored its regulation to effectuate its purpose. A numerical limitation selected with no particular logical rationale is insufficient to meet this burden, especially when that limit exhibits a real danger of swallowing up everything by being *de facto* no limit at all.

Here, however, the Attorney General has relied on the conclusions of a federal agency engaged in the very same objective: the protection of children from tobacco products. The Administration selected 1000 feet as the appropriate zone,

and described that zone as inclusive of places where children spend a lot of time. This Court will not second-guess the Attorney General's decision to rely on the Administration's conclusions in selecting the numerical limit of a zone of regulation.

That reliance, however, must be seen to relate to substantially the same subject matter. Although the Administration's proposed regulations address all forms of *outdoor* advertising, they do not address *indoor* advertising in stores near schools or playgrounds. It may seem to be common sense to conclude that children frequent stores within the areas in which they spend the most time. But there is a perceptible difference between places where children simply *travel* as they go to school or to the playground, and the interior of places where they choose to spend their money. The former involve areas in which children are unlikely to exercise voluntary control because they are merely observing advertisements on the way to their usual destination. It is also likely to be a daily, repetitive exposure of a long duration. The latter situation is an actual destination of a child with a purpose in mind–to spend money. The transaction is occasional and brief, but it occurs at the vulnerable moment of a commercial transaction, at the situs where cigarettes are actually sold. Whether these (or other) differences are significant is *not* for this Court to decide. It is enough that the rationale pointed to by the Attorney General for selecting a 1000-foot perimeter fails to indicate narrow tailoring with respect to retail stores containing *indoor* advertisements. The Administration never delineated what the proper zone would be, if any, for regulation of *indoor* advertisements in stores near schools or playgrounds.

The Tobacco Regulations therefore pass the four-part *Central Hudson* test with the exception of 940 C.M.R. § 21.04(5)(b), the provision relating to point-of-sale advertising. The Attorney General has failed to demonstrate that 940 C.M.R. § 21.04(5)(b) is "not more extensive than is necessary to serve the government interest" because its sole justification for the

selection of a 1000-foot zone relates to conclusions by a federal agency concerning *outdoor* advertising. For the same reason, the companion Cigar Regulation at 940 C.M.R. § 22.06(5)(b) cannot stand.

Under 940 C.M.R. § 21.06 (and the Cigar Regulations' companion § 22.08), the point-of-sale advertising provision can be severed from the rest of the regulations. The outdoor advertising restrictions in 940 C.M.R. § 21.04(5)(a) thus stand.

ANALYSIS RELATING TO CIGAR REGULATIONS

The Cigar Regulations

The Attorney General and the Cigar Companies have filed cross-motions for summary judgment testing the validity of provisions in the Cigar Regulations imposing warning label requirements on cigar packaging and advertising, and advertising restrictions paralleling the Tobacco Regulations. These Cigar Regulations express a purpose similar to the Tobacco Regulations, with the additional aspiration that

> Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisements of such products within Massachusetts . . .

940 C.M.R. § 22.01.

First Amendment Challenge to the Advertising Provisions of the Cigar Regulations

In addition to echoing the First Amendment argument advanced by the Tobacco Companies, the Cigar Companies argue that cigars are distinguishable from cigarettes and that this distinction entitles their products to a differential First Amendment analysis.

The Cigar Companies point out several differences between the cigar market and the cigarette market. *See* Pls.' Opp'n (Cigar Warnings) at 3-5. By way of summary, the main points are that (i) the cigarette manufacturers spend over 100 times more on advertising than do the cigar companies; (ii) the Food and Drug Administration, in 1996, decided not to include cigars in its regulation of tobacco because of insufficient evidence of use by children or adolescents; (iii) the cigar companies do not use billboards and engage in relatively little magazine and newspaper advertising; and (iv) cigars involve a "tactile interaction" at the point of sale in which consumers like to feel, smell, and look at the quality of the cigar prior to purchase. *See id.*

The crux of the Cigar Companies' argument about product distinctions falls on parts three and four of the *Central Hudson* test, outlined *supra*. Namely, the argument implicates the questions of whether the regulation advances the governmental interest and whether the regulation is not more extensive than necessary.

Advances the Governmental Interest and is No More Extensive than Necessary

The Cigar Companies argue their products are materially distinguishable from cigarettes because of the different nature of the cigar market.[14] The Attorney General has imposed upon them the burdens of advertising regulations in the absence, they argue, of any evidence that cigar advertising increases youth consumption of cigars.

If the Attorney General has no evidence at all to support a link between advertising and underage *cigar* smoking, it would seem that the Cigar Companies' argument is valid. That is to say, where a product subject to advertising regulations is related

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[14] Unfortunately, the familiar adage attributed to Sigmund Freud that "sometimes a cigar is just a cigar" does not instruct this Court on whether a cigar is ever a like a cigarette for purposes of the First Amendment.

to but materially distinguishable from a product whose advertising is legitimately regulated, the Attorney General must show, under *Central Hudson*, how regulation of the distinguishable product also materially advances the governmental interest. If, however, the products lack material differences, it is appropriate that the Regulations cover both without a separate First Amendment analysis.

The Cigar Companies claim that there is no logical reason to believe that the Cigar Regulations will reduce youth access to cigars, and no studies so finding. Thus, they argue, the portions of the Cigar Regulations related to indoor and outdoor advertising, 940 C.M.R. 22.06(5)(a) and (b), fail to satisfy the third and fourth parts of *Central Hudson* because the Regulations do not advance the governmental interest.

The Attorney General's response is that there is sufficient evidence for the Regulations to treat cigarettes and cigars alike. *See* Def.'s Mem. (Cigar Warnings) at 2. The similarities between the products pointed out by the Attorney General relate to chemistry, disease consequences, trends in consumption, and marketing practices. It is, of course, unlawful for minors to purchase cigars. It also seems fairly clear that the toxicity and disease consequence of cigars are similar to that of cigarettes, invoking a similar underlying governmental interest in regulating youth consumption.[15] The Attorney General claims that data, more recent than those cited by the Cigar Companies, show alarming rates of youth cigar use and an increase in youth cigar use. *See id.* at 4-6. Furthermore, the Cigar Companies' efforts to promote cigars as symbols of success, elegance, and athleticism create a risk that children will find the advertisements increasingly appealing, especially in light of the

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[15] The Attorney General does not have to establish a link between smoking and health to survive First Amendment scrutiny. The true relevant analysis is that the purchase of cigars is unlawful for minors and thus the government has an interest in promoting compliance with that law. The Regulations must advance the governmental interest in promoting compliance.

lower number of visible cigarette advertisements. *See generally* the glossy magazines *Cigar Aficionado* and *Smoke*. The editorial policies of each promote cigar smoking as the path to "the good life" and a "distinctive lifestyle." According to the Attorney General, the Federal Trade Commission found that cigar advertising increased by 32 percent in the two-year period from 1996 through 1997. *See* Def.'s Mem. (Cigar Warnings) at 4. A 1996 survey shows that 26.7 percent of fourteen to nineteen year-olds had smoked at least one cigar in the preceding year. *See id.* It is logical for the Attorney General to accept the proposition that cigar advertising has similar effects on underage smoking as cigarette advertising, even though there have been fewer studies so to demonstrate. The last thing the Attorney General would desire is to shift children from purchasing cigarettes to purchasing cigars by allowing the growth of cigar advertising in place of cigarette advertising. Although the increase in cigar smoking may be a passing "trend," as suggested by the Cigar Companies at oral argument, the Commonwealth can respond to that trend or take action *either* to further its demise or prevent its recurrence. There is thus support for treating the cigars as indistinct from cigarettes.

Additionally, the Cigar Regulations can be supported on the rationale that the cigars, even if distinguishable, are separately subject to regulation under *Central Hudson* because they create an interest by minors to which the Attorney General has responded with an effective and narrowly-tailored regulation. It seems reasonable to this Court for the Attorney General to be concerned about youth consumption of cigar tobacco in the same way it is concerned about cigarette tobacco. The Attorney General should not have to wait until there is a new epidemic of underage cigar smokers in order to enact regulations intended to prevent that very epidemic. Cigars may not be as popular as cigarettes, but they are just as illegal for minors to purchase, and they, therefore, carry just as much of a government interest as cigarettes. The differences may be akin to those among beer, liquor, and wine. Although underage drinkers may prefer beer and liquor to wine, that does not call for a differential First

Amendment treatment of regulations restricting advertising of those products. Nor would the connoisseur aspect of wine or its more upscale advertising methods cause this Court to ignore it as an alcohol product. So, too, cigars. Given the showing of a legitimate reason to roll cigars into the comprehensive but tailored plan to combat underage smoking, this Court will not second-guess the wisdom of the Attorney General's decision to act now. This Court concludes that to the extent that they materially differ in nature, cigars and cigarettes are so interrelated and implicated in the same governmental interest as to be capable of identical regulation.

As this Court rules that cigars and cigarettes are indistinguishable for the purposes of First Amendment advertising protection, the *Central Hudson* analysis is the same as that for cigarettes. The remaining parts of the *Central Hudson* test are analyzed, and the conclusions reached, in the same manner as they were for the other tobacco products. Consequentially, the Attorney General has satisfied the *Central Hudson* factors in all but one area. He has not demonstrated that the Commonwealth's regulation of *indoor* point-of-sale advertising is no more restrictive than necessary. The selection of the 1000-foot zone around schools and playgrounds cannot be supported by a contemplated federal regulation relating to *outdoor* advertising. *See* discussion *supra* Part IV.B.2.c. Section 22.06(5)(b) is therefore invalid.

Restrictions on Retail Practices

The Cigar Companies' have also expressed First Amendment concerns regarding the physical location of cigars in stores. These concerns are not properly examined under a First Amendment analysis because they do not implicate speech or expression.

First, the Cigar Companies lament the prohibition of self-serving displays of cigars by 940 C.M.R. § 22.06(2)(c). In the context of cigarette sales, self-service displays are not advertisements whose speech or expression is protected. *See*

Rockwood v. City of Burlington, 21 F.Supp.2d 411, 420-21 (D.Vt. 1998). So, too, cigar self-service displays. It is irrelevant that cigars come in different varieties or that some customers like to handle the cigars before purchasing them. These are characteristics of the commodity itself, not indications that protected expression exists. Stores are already in the practice of keeping certain tobacco products behind the counter. If cigars must likewise be locked up or placed out of reach as a result of these regulations, that cannot properly be said to pose First Amendment problems distinguishable from those occasioned by restrictions on cigarette sales practices. Although aroma, feel, and look may be important "information" for cigar consumers, that information is neither speech nor expression. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (where a village regulated sale of items near display of literature encouraging illegal use of drugs, "the village [did] not restrict speech as such, but simply regulate[d] the commercial marketing of items"). For consumers seeking that information, cigars may be examined on request at the store. Furthermore, the fact that many cigars are today mass-packaged without ability for individual examination makes this argument mostly spurious.

Second, the Cigar Companies also object to the ban on cigar sampling and promotional give-aways located at 940 C.M.R. § 22.06(1)(a). This restriction arguably may hinder channels of "communication" to adult consumers by depriving them of the information contained within the product itself. That argument is flawed. If accepted, the argument would implicate every commercial transaction regulation in the country in a First Amendment analysis because any sale or give-away of a product inherently conveys information about that product itself. This is simply a misreading of the reach of the First Amendment. The restrictions on sales restrictions at § 22.06(1) and (2) are valid.

Challenges to the Cigar Warning Requirements

The Relevant Cigar Regulations

The Cigar Regulations require that packages of machine-made cigars and cigar advertising carry warnings that cigars are not a safe alternative to cigarettes and that cigar smoke contains carbon monoxide and nicotine (the "Warnings"). *See* 940 C.M.R. §§ 22.04-22.05. The Attorney General has asked for summary judgment declaring that the Warnings do not violate the First Amendment and the Commerce Clause. The Cigar Companies have filed a cross-motion for summary judgment on the same grounds.

The Attorney General has extensively outlined the health risks of cigars and the growing popularity of cigars in his memorandum. *See* Def.'s Mot. (Cigar Warnings) at 3-5. The Warnings are intended to fill in the gap in federal health warnings, which apply only to cigarette and smokeless tobacco packages, and to provide consumers with information about the dangers of cigar smoking. These Warnings must occupy 25% of the front or top panel of the package (whichever is larger) in clear and conspicuous black-and-white print. *See* 940 C.M.R. § 22.04(2). The 25% warning allocation space may also be used for any federal, state or local warnings that may be required, so long as the Massachusetts warnings remain clear and conspicuous. *See* 940 C.M.R. § 22.04(2)(b). The regulations also require 20% of any cigar advertisement to include the Warnings. *See* 940 C.M.R. § 22.04(2). The use of a pre-printed sticker affixed to the package or advertisement constitutes compliance. *See* 940 C.M.R. § 22.04(2)(b).

First Amendment Analysis

The Attorney General argues that the Warning provisions do not violate the First Amendment. Product disclosure and warning requirements are generally upheld if they are reasonably related to the state's interest in preventing deception of consumers. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S.Ct.

2265, 85 L.Ed.2d 652 (1985). "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides [citation omitted] [the] constitutionally protected interest in not providing any particular factual information in [ ] advertising is minimal." *Id.* at 651, 105 S.Ct. 2265. The Attorney General points out that consumer product warnings are commonplace and have long served to inform consumers of the risks of such products as cigarettes, alcohol, prescription drugs, pesticides, raw milk, and hazardous substances. Citing cases that have upheld such warnings, the Attorney General asserts that the Warnings are reasonable and require no further scrutiny under the First Amendment. *See* Def.'s Mem. (Cigar Warnings) at 8-9. Since it is the regulation that declares the cigar advertisements "unfair or deceptive," rather than any particular words in the advertisements themselves, this argument is too superficial to resolve the issue.

The Attorney General continues with a *Central Hudson* analysis in which he argues that the Warnings' requirement satisfies all four prongs of the test.[16] It seems clear that the health effects of cigar smoking on Massachusetts consumers are a substantial state interest, easily satisfying the second *Central Hudson* prong.

Mandatory labeling warnings seem particularly suited to advancing the state interest in informing consumers of hazards, because they are delivered at the point of consumption. Courts have, therefore, found the third prong of *Central Hudson* easy to satisfy in the context of product warnings. *See In Re R.M.J.*, 455 U.S. 191, 201, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 375, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) ("the preferred remedy is more disclosure, rather than less"). *Central Hudson* itself suggested that it might

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[16] The first prong, eligibility for protection, he seems to admit or ignore. Since cigars are legal, this Court assumes their packaging and advertising is also legal and thus protected.

be permissible to "require that advertisements include information about the relative efficiency and expense of the offered service." 447 U.S. at 571, 100 S.Ct. 2343.

The Cigar Companies advance several reasons for why they believe the Warnings will not advance the governmental interest. These include the argument that the labels will be ignored over time and will not be visible behind the counter. Furthermore, one aspect of the Warnings' text[17] advises consumers about the ingredients of cigar smoke but does not directly inform anyone whether or not cigar smoking is addictive or dangerous. The Cigar Companies argue that these warnings cannot further the governmental purpose in warning consumers about the dangers or addictive properties of cigar smoke because they do not identify any specific risks associated with cigars. This argument is disingenuous – it suggests that the Cigar Companies would support warning language that more clearly condemns their products, warnings which directly assert the dangers of cigar smoke, rather than a requirement merely to list important ingredients.

The argument is unpersuasive, in any event. The first warning alerts the consumer to important contents of cigars, one of which (nicotine) is an "addictive drug" and the other of which (carbon monoxide) is commonly known to be hazardous. The other indicates the danger of cigars by comparing them to cigarettes, the dangers of which many consumers already know. These advance the governmental interest in consumer knowledge and awareness of the nature of cigars. The Cigar Companies' semantic quibbles are not persuasive. It is not necessary that the government pick the absolute most effective warning text for a package to pass this prong of *Central Hudson*. Rather, the government must select some language

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[17] The Warnings require rotation of the following two statements: "WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug" and "WARNING: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products."

which directly advances its interest. Here, it has done so. The Warnings' requirement satisfies the third prong of *Central Hudson*.

The Attorney General next argues that the Warnings' requirement comports with the final prong of the Central Hudson analysis by being narrowly tailored to serve the governmental interest. He bases this argument on the fact that the Warnings do not limit speech but rather provide important additional information in a place noticeable by the consumer. *See* Def.'s Mem. (Cigar Warnings) at 13. He provides several examples of how the law is tailored to suit its objectives. The Warnings are formatted to be simple and easy to see. They cover only 25% of one side of the package (or 20% of advertisements). *See* 940 C.M.R. §§ 22.04(2), 22.05(2). The Warnings do not apply to hand-rolled cigars. *See* 940 C.M.R. §§ 22.03, 22.04. The warning area may be allocated to other required warning uses. *See* 940 C.M.R. § 22.04(2)(c). A sticker may be used to simplify the transition and administration of the labeling. *See* 940 C.M.R. § 22.04(2). The Attorney General argues that these and other characteristics of the Warnings make them narrowly tailored to address the governmental interest. This Court finds the argument persuasive.

The Cigar Companies' attack based on the fourth prong of *Central Hudson* rests on the burden the Warnings impose. *See* Pl.Resp. (Cigar Warnings) at 15-18. The Warnings are described as so large and of such a format as to eliminate print advertising for cigars. They argue that cigar manufacturers are unlikely to advertise if they must devote 20% to the Warning. In contrast, federal regulations do not require a certain proportion of the advertisement, but only require a "conspicuous" or "prominent" warning. Furthermore, there is no affirmative misleading communication on the packaging or in the advertising of cigars that needs such a drastic warning counter-message, unlike the situation in *Zauderer*, 471 U.S. at 652, 105 S.Ct. 2265.

Although these are thoughtful points, and the burden imposed on the cigar industry is not light, the Warnings' requirements are adequately tailored for the government's purpose. It is doubtful that Cigar Companies will stop advertising due to a 20% increase in the cost of running their advertisements (to account for the 20% loss of space). They will simply, it can be imagined, pass that cost along to the consumers or pay for advertisements that are smaller overall. The Cigar Companies have already admitted that their advertising budget is 100 times smaller than the cigarette companies' budgets, *see* Pls.' Opp'n (First Amendment) at 3-4, so the thought that this regulation might cripple the industry is absurd. Furthermore, the packaging requirements leave most of the packaging available for industry use, and incorporate the flexibility of sticker-based compliance. The Attorney General has not overstepped the limits of the First Amendment in crafting his Warnings requirements. The Warnings are a valid exercise of warning-label regulation under the *Central Hudson* framework.

Commerce Clause Analysis

The Cigar Companies have also challenged the Warnings' requirements on the basis of the Commerce Clause. The Cigar Companies argue that commerce in cigars is national in scope, and that individual state regulation over cigar packaging will result in inconsistent standards, will have the effect of controlling conduct outside of the state, and imposes a burden which outweighs any local benefits.

It is critical to note at the outset that this is not a case that involves discrimination against out-of-state economic actors. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). A discriminatory state regulation would be subject to strict scrutiny, *see id.*, but state laws that are evenhanded in application are generally upheld under the Commerce Clause unless the burden imposed on interstate commerce is excessive in relation to the local benefits of the laws. *See Pike v. Bruce Church, Inc.*, 397 U.S.

137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The Cigar Regulations do not in any way discriminate among cigar manufacturers. A Commerce Clause analysis of the burdens and benefits of the Cigar Regulations is therefore in order. Before proceeding to that analysis, however, this Court will address the Cigar Companies' arguments relating to a "per se" theory of violation of the Commerce Clause.

National Uniformity

The Cigar Companies first challenge the Warnings' requirements on the ground that they require national uniformity. There exist "those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). This theory essentially recognizes that the Commerce Clause can, by its own force, pre-empt entire fields of commerce from state regulation. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Hunt v. Washington Apple Advert. Comm'n*, 432 U.S. 333, 350, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) ("the Commerce Clause acts as a limitation upon state power even without congressional implementation"). This kind of invalidation of state regulation is rare, however, and is invoked only when a lack of national uniformity would impede the flow of interstate goods. *See Exxon*, 437 U.S. at 128, 98 S.Ct. 2207.

In support of their argument that the cigar market requires uniform national regulation, the Cigar Companies point out that a regulation by California requiring a warning on all cigars has resulted in those California warnings appearing on 90% of all cigar packages in the United States and that the addition of other warnings from other states will result in multiple warnings on the same packaging. *See* Pls.' Resp. (Cigar Warnings) at 3. They fear that several pending proposed regulations could require as many as three changes to the packaging in one year.

The Attorney General, however, makes it clear that the Cigar Regulations do not impose labeling burdens on packages appearing outside Massachusetts. If the Cigar Companies decide to label all their packages the same way, nationally, for efficiency, that is their choice and not the direct result of the Cigar Regulations.

The Commerce Clause protects the interstate market, not the right to conduct business in the most efficient manner. *See Exxon*, 437 U.S. at 127-8, 98 S.Ct. 2207. Although the Cigar Companies may prefer internally to consider the cigar market national in scope, there is no inherent reason why the packaging and advertising cannot be managed locally, especially when the regulations allow for sticker-based warnings that can be applied as soon as the cigars enter the destination state from the point of manufacture.

The only conceivable reason to find a "per se" violation of the Commerce Clause here under *Southern Pacific* would be for this court to find that the Cigar Companies' management decisions themselves have created a market that is fundamentally national in scale. To do so would allow manufacturers to avoid state regulation, under the guise of Commerce Clause protection, through marketing decisions that the manufacturers themselves create, promote, and control. Virtually every consumer goods industry could escape state regulation under that proposed standard merely by implementing a centralized packaging and distribution scheme for their products. Those business decisions do not take a market of recreational consumer goods typically sold in local stores and automatically turn that market into one requiring national uniformity in regulation. The Cigar Warnings are not invalid on the basis of *Southern Pacific* or its progeny.

Interference with Commerce in Cigars Outside Massachusetts

Advancing an argument similar to the previous one, the Cigar Companies argue that the practical effect of the

Warnings' requirement is to control conduct beyond Massachusetts. They reach this conclusion by adverting to the channels through which cigars are advertised. These include national magazines and the Internet. It is argued that "the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Institute*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

The Cigar Companies claim that they would be required to design, produce, and inventory Massachusetts' labels for all of their transactions in order to ensure their compliance with the Regulations. Using a point-of-sale sticker system would not solve this administrative problem, it is argued, because the Warnings' requirements make it illegal to import for sale cigars without the Warnings. Thus, goes the argument, the labeling must be done prior to entry into Massachusetts, having an impact on commerce outside the Commonwealth. The Cigar Companies also fear that they would have to include the Massachusetts Warnings in national advertisements, including the Internet, that could be viewed in the Commonwealth to satisfy the advertising requirements.

The Attorney General responds that the Cigar Companies have made no effort to determine the actual cost or feasibility of alternative packaging and simply stand behind the status quo for efficiency purposes. He also points out that most cigar advertising is regional and will not require the placement of Massachusetts Warnings on national advertisements unless the Cigar Companies find that more convenient.

The Cigar Companies have demonstrated areas of legitimate concern where the Cigar Regulations may inadvertently have consequences on out-of-state economic activity. The Supreme Court has made clear, however, that the *indirect* effects on interstate commerce arising from a state regulation are subject to analysis under *Pike* and not subject to strict scrutiny under a theory of "per se" violation of the Commerce Clause. The Supreme Court acknowledged that

"there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). Even *Healy*, 491 U.S. at 336, 109 S.Ct. 2491, which the Cigar Companies quote to support their "practical effect" argument, invoked the idea of "practical effect," but did so in the context of a regulation that "directly control[ed] commerce occurring wholly outside the boundaries of a State," in the absence of legislative intent to so control commerce. The law struck down in *Healy* required every liquor distiller or producer that sold liquor to wholesalers within New York to sell at price that was no higher than the lowest price the distiller charged wholesalers anywhere else in the United States. *Healy* contained a clear example of a regulation that facially contemplated intrastate transactions but that had a practical *direct* effect of local protectionism, as the Supreme Court recognized. *See id.* at 339, 109 S.Ct. 2491. The Cigar Regulations have neither the intent nor the direct practical effect of discrimination or local protectionism. It concerns information on the packages of products sold within Massachusetts regardless of who sells them and regardless of what other states are doing to inform their own citizens of the health risks of cigar smoking. Thus the Cigar Companies' concerns about "practical effects" are more properly considered under the *Pike* balancing test, *infra*.

Burdens on Interstate Commerce that Outweigh the Putative Local Benefits

Using arguments similar to those used above, related to the marketing and advertising mechanisms used in the cigar market, the Cigar Companies argue that the Warnings' requirements impose a burden on interstate commerce that outweighs the local benefits behind the Cigar Regulations. This theory emerges from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Cigar Companies first argue that *Pike* only applies to exclusively local interests, based on its language, and that matters of national concern are not local interest that can ever outweigh the interests of interstate commerce. This is nonsense. Every local issue has some aspect of interest to the nation as a whole. The Supreme Court has recognized national concerns as legitimate state interests under the Commerce Clause. *See, e.g., Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 473, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (conservation of energy and natural resources).

The Cigar Companies point to equally effective alternatives that are less burdensome on interstate commerce, such as a warning display sign at retail outlets, public education, or adopting the California warning. In Massachusetts, however, many such alternatives are already in effect but seem to have had minimal impact on further educating the public about the risks or reducing the incidence of cigar smoking. Although the Cigar Companies are correct that there are alternatives that will have less, or indeed *no*, impact on interstate commerce, the Commonwealth does not need to resort to such alternatives. *Pike* envisions a showing that the burden is "clearly excessive" in relation to local benefits. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well

with a lesser impact on interstate activities." *Clover Leaf*, 449 U.S. at 471, 101 S.Ct. 715 (quoting *Pike*, 397 U.S. at 142, 90 S.Ct. 844). The local benefits here are compelling--to educate consumers about what they are purchasing and to inform them of the undisputed health dangers of cigar smoking. The burden imposed on the industry is not excessive, in light of such a strong local interest. Rather, it reflects the implementation of feasible warning labeling similar to that found on other products. This Court need not engage in a fact-intensive balancing analysis of the benefits and burdens. "[O]nly the most minimal sort of balancing, if any, is necessary." *National Kerosene Heater Ass'n v. Massachusetts*, 653 F.Supp. 1079, 1092 (D.Mass.1986) (Skinner, J.).

With the strong local interest clearly shown, it remains to inquire about the burden on interstate commerce. The Cigar Companies have repeatedly claimed that the Regulations may result in costly modifications to their packaging operations. The Attorney General responds to the Cigar Companies' repeated cries concerning the infeasibility of modifying their packaging systems by pointing to the corporation, John Middleton, Inc., which has been distributing cigars in California with the California warning, and elsewhere without any warning. They also point out that tax regimes in certain states such as Alabama and Arizona require state-specific tax stamps to appear on the packages. In another example, Iowa allows escape of certain tax liabilities by using the wording "two for the price of one" rather than "buy one get one free," and Cigar Companies have modified packaging for those purposes. *See* Def.'s Opp'n (Cigar Warnings) at 5.

The fact is that modern companies are capable of adapting to the packaging requirements of individual states and have been doing so in many different industries. Although this change may require retooling of certain structures, or coordination with the retailers, the Warnings labeling is possible and reasonable. By relying on a national system of packaging, the Cigar Companies have established an efficient labeling

system, but efficiency fails to overcome the strong local interests of the Commonwealth in protecting the health and consumer choice of its citizens. It may be time for Congress to step in with a national cigar labeling program and pre-empt the states in this area, but until it does so, it is unreasonable to force Massachusetts to wait and allow its citizens to remain deprived of important consumer health information.

The Cigar Companies do raise legitimate concerns about certain portions of the Cigar Regulations which seem especially likely to burden activities outside the state, depending on their interpretation. In particular, these concerns relate to the portions of the Cigar Regulations which seem to require that a Massachusetts Warning be present on the cigar package when the package enters the Commonwealth, and portions that seem to require warnings on national and Internet-based advertising. These portions are subject to a proper narrowing construction by this Court. *See Rhode Island Assoc. of Realtors, Inc. v. Sheldon Whitehouse*, 199 F.3d 26, 35-36 (1st Cir.1999) ("Even when state officials fail to offer an authoritative interpretation of a state statute, a federal court considering a pre-enforcement challenge sometimes will presume a narrowing construction to which the law is fairly susceptible.") (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n. 11, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

This Court holds that the language in 940 C.M.R. § 22.04(2) can be interpreted to allow compliance when the warning labels are affixed by the *last* retailer on the chain of commercial distribution prior to sale. That is because the failure to include the Warning is rendered a "deceptive act or practice" not when the goods cross the Massachusetts' state line, but rather when merchants "import for sale" the cigars. *See* 940 C.M.R. § 22.04(1)-(2). In order to lessen the Cigar Regulations' burden on interstate commerce, this Court construes that language to mean that the Cigar Companies may affix the warning sticker to the cigar package when the package has reached the ultimate "importer *for sale*," namely the retail

merchant, so long as the sticker is present by the time any end-consumers are able to view the package.

The word "distribute" also appears in these sections, *see id.*, but incidental "distribution" for the purpose of delivering the package through the stream of commerce to the end merchant ought not be captured by the statute. Rather, this Court rules that the word "distribute" refers to instances in which persons subject to the Cigar Regulations distribute directly to the end consumer, for example at factory outlets. A construction which would be broad enough to require the label to be affixed while the package is still in the hands of distributors or sub-distributors does nothing to further the purpose of the Regulations since it has no effect on the message ultimately presented to the cigar consumer. The Attorney General would surely agree that the ultimate local interest served by the Warnings is to inform consumers of the dangers of smoking cigars. Requiring a warning to be attached before consumers are in a position to see it is unnecessary to effectuate the goals of the law, and poses a significant burden on activities taking place outside the Commonwealth. The regulation's implementation should be limited to prevent that imbalance of interests.

This Court also has grave concerns that the Cigar Regulations, as they are written, might apply impermissibly to national magazines available for purchase in Massachusetts, or to the Internet. The Regulations render it an "unfair or deceptive act or practice" for any person "to advertise or cause to be advertised within Massachusetts any cigar or little cigars" without including the warnings comprising 20% of the area of the advertisement. 940 C.M.R. § 22.05. This broad language capturing the acts of persons who merely "cause to be advertised" cigar products seemingly imposes upon advertisers in national magazines, such as *Cigar Aficionado* and *Smoke*, the burden of including a Massachusetts Warning in any magazine that distributes any of its copies to any Massachusetts readers. At oral argument, the Attorney General agreed that the Cigar

Regulations could be construed to capture national magazines even though that was not the intent of the Commonwealth. *See* Tr. of Mot. Hr'g, Dec. 2, 1999, at 7. Such an interpretation would place a great burden on interstate commerce since it would require the Massachusetts Warning to be carried by a national magazine in order to ensure that any copies ending up in Massachusetts carry the Warning. This Court does acknowledge that the Commonwealth has a strong local interest in providing cigar information to its citizens who read national publications. It would be unfortunate if the Cigar Companies took advantage of this Court's limiting instruction to skirt the law by increasing their advertising in national magazines. The Cigar Regulations as a whole, however, provide ample opportunity for warning Massachusetts consumers, including local magazines, and on the packages themselves. Thus, the Commonwealth's local interest in capturing national magazines is outweighed by the burden it would place on interstate commerce. This Court holds that cigar advertisements in magazines or other print media that are truly national in distribution need not include the Massachusetts Warnings. If a magazine or other print medium has a "Massachusetts edition" in which the advertisements are selected or designated solely or especially for a Massachusetts audience, the burden on interstate commerce is minimal because the Cigar Companies can easily add the Warnings to the Massachusetts edition. In those cases only, the cigar advertisements in that magazine or other print medium are required to comply with the Warnings' requirements.

The Internet poses a similar issue by virtue of the fact that Internet-based advertising is targeted at no state in particular, but at all states in general. Furthermore, the dynamic nature of text and images appearing on an Internet browser does not lend itself well to a regulation that sets aside a percentage of "area" of an advertisement. The Attorney General acknowledged, during oral argument, the uncertainty of the application of the Regulations to the Internet. *See* Tr. of Mot. Hr'g, Dec. 2, 1999, at 11. He later provided a letter to the Court expressing the

position that the general warning requirement set forth in 940 C.M.R. § 22.05(1) applies to Internet advertising, while the Regulations specifying size and format requirements in 940 C.M.R. § 22.05(2) would not. *See* Letter from Jeffery D. Clements to Young, C.J. of Dec. 23, 1999 at 2. Although this may be the aspiration of the Commonwealth now, that construction has been expressed to the Court informally, not via the deliberate and important process of rulemaking. This Court will thus give a narrow construction to the provisions, and has no occasion to consider broader construction. Since cigar advertisements appearing on the Internet are not "within Massachusetts"[18] and since it seems plain that the Attorney General, in creating the Warning provisions, contemplated a tangible paper medium, this court holds that Internet advertisements are not subject to the Warnings' requirements in either 940 C.M.R. § 22.05(1) or (2).[19]

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[18] This conclusion seems accurate even in light of the Attorney General's desired use of the definition of "advertisement" in its Retail Advertising Regulations, 940 C.M.R. § 6.00. *See* Letter of Jeffrey D. Clements to Young, C.J. of Dec. 23, 1999 at 1. In that definition, "oral, written, graphic, or pictorial representations" within Massachusetts are contemplated, as is "any representation disseminated within Massachusetts if the advertisement is directed to consumers in Massachusetts." *Id.* at 1, n. 1 (quoting 940 C.M.R. § 6.01). Internet advertising is not directed to consumers in Massachusetts in particular, and therefore fails to fit the definition.

[19] Even if the Commonwealth were explicitly to include Internet advertising in the Warnings' requirements, that regulation would likely run into significant difficulty under *Pike* due to the heavy burden it would place on interstate commerce. *See American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 169 (S.D.N.Y.1997) (using the Commerce Clause to strike down a New York statute making it a crime to disseminate obscene materials to minors via the Internet). The Court's ruling with respect to the Internet does not necessarily compel the same conclusion with regard to electronic mail ("E-mail"). To the extent that E-mail represents an electronic replacement of the traditional letter and requires that the disseminator have some idea of the location (though not necessarily geographical situs) of the receiver of the advertisement, its regulation might impose a lesser burden on interstate commerce. *But see id.* at 171-72 (E-mail users cannot predict the geographical destination or origin of messages).

CONCLUSION

For the reasons set forth above, this Court declares that both the Tobacco Regulations and the Cigar Regulations, as construed herein, are valid exercises of the authority of the Attorney General with the sole exceptions of the parameters of the point-of-sale Tobacco Regulations, 940 C.M.R. § 21.05(5)(b), as amended through Jan. 19, 2000, and the cognate Cigar Regulations, 940 C.M.R. § 22.06(5)(b), as amended through Jan. 19, 2000. Additionally, this Court holds that cigar advertisements in national magazines and in other national media are exempt from the Warnings requirements of 940 C.M.R. § 22.05. Nothing herein prevents the Attorney General from adopting a broader construction of his regulations than this Court here affords, so long as he proceeds by express formal rulemaking subject to challenge by the affected parties. Likewise, he may immediately choose to adopt some parameter for point-of-sale regulation so long as he proceeds in like fashion and justifies his delineation. Those matters are not, however, now before this Court. The cross motions of the parties are thus allowed in part and denied in part in accordance with this opinion. [Docket Nos. 32, 48, 78, and 84.] Judgment will enter as declared above.

SO ORDERED.

The Court has no occasion to consider these additional issues and merely reflects on them for the benefit of thorough analysis.

APPENDIX D

CODE OF MASSACHUSETTS REGULATIONS TITLE 940: OFFICE OF THE ATTORNEY GENERAL CHAPTER 21.00: SALES AND DISTRIBUTION OF CIGARETTES AND SMOKELESS TOBACCO PRODUCTS IN MASSACHUSETTS

(1/22/99)

21.01: Purpose

The Attorney General of Massachusetts promulgates 940 CMR 21.00 relating to cigarette and smokeless tobacco product manufacturers and retailers pursuant to his authority in M.G.L. c. 93A, § 2(c). The purpose of 940 CMR 21.00 is to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age. 940 CMR 21.00 imposes requirements and restrictions on the sale and distribution of cigarettes and smokeless tobacco products in Massachusetts in order to prevent access to such products by underage consumers.

21.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a) and they do not legitimize acts or practices not specifically prohibited by 940 CMR 21.00.940 CMR 21.00 is designed to supplement existing regulations. All references in 940 CMR 21.00 to statutes and other regulations shall include amendments made to such statutes and regulations after the effective date of 940 CMR 21.00.

940 CMR 21.00 shall apply to any person who manufacturers, packages, imports for sale, sells or distributes within Massachusetts cigarettes and smokeless tobacco products as defined in 940 CMR 21.00.

940 CMR 21.00 shall not apply to the manufacture, packaging, importation for sale or distribution within Massachusetts of cigars and little cigars. These products are regulated by 940 CMR 22.00 *et seq*.

21.03: Definitions

Cigarette shall be defined as that term is defined in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq.

Smokeless Tobacco shall be defined as that term is defined in the Federal Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401 et seq.

Package means a pack, box, carton, pouch, or container of any kind in which cigarettes or smokeless tobacco products are offered for sale, sold, or otherwise distributed to consumers.

Sale or distribution shall be defined to include sampling or any other distribution not for sale.

Manufacturer means any person, including any repacker and/or relabeler, who manufactures, fabricates, assembles, processes, or labels a finished cigarette or smokeless tobacco product.

Distributor means any person who furthers the distribution of cigarettes or smokeless tobacco, whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption.

Point of sale means any location at which a consumer can purchase or otherwise obtain cigarettes or smokeless tobacco for personal consumption.

Retailer means any person who sells cigarettes or smokeless tobacco to individuals in Massachusetts for personal consumption, or who operates a facility located within Massachusetts where vending machines are located.

Secret shopper program shall be defined to include, at a minimum, six visits per year to a retail sales outlet by a person retained by a retailer, where the person poses as a customer in order to ensure compliance by the outlet's employees with laws prohibiting the sale of tobacco to minors, with each visit made on a different day and at a different time, and, where practical, to a different outlet employee.

Advertisement (including the terms "advertise" and "advertising") means any oral, written, graphic, or pictorial statement or representation, made by, or on behalf of, any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts cigarettes or smokeless tobacco products, the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette or smokeless tobacco product. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less. The terms "advertisement," "advertise," and "advertising" shall be interpreted in a manner which is consistent with the definition of the same terms in the Attorney General's Retail Advertising Regulations, 940 C.M.R. 6.00.

Clear and Conspicuous shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

Playground means any outdoor premises or grounds owned or lawfully operated by or on behalf of, the State, any State agency, or any political subdivision of the State, or any public, private or parochial school, any child day care center or any youth center, which contains any device, structure or

implement, fixed or portable, used or intended to be used by persons under the age of 18 for recreational or athletic purposes including, but not limited to, play equipment such as a sliding board, swing, jungle gym, sandbox, climbing bar, wading pool, obstacle course, swimming pool, see-saw, baseball diamond, athletic field, or basketball court.

21.04: Point of Sale Restrictions

(1) Retail Sales Practices. Except as otherwise provided in 940 CMR 21.04(4), it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

(a) sampling, promotional give-aways, or any other free distribution of cigarettes or smokeless tobacco products;

(b) breaking or otherwise opening any cigarette or smokeless tobacco product package to sell or distribute any number of unpackaged or repackaged cigarettes or any quantity of smokeless tobacco that is smaller than the smallest package distributed by the manufacturer for individual consumer use;

(c) distribution of cigarettes or smokeless tobacco products through the mail, including redemption of coupons, credits and proofs-of-purchase, except as otherwise provided in 940 CMR 21.00;

(d) sale or distribution of cigarettes or smokeless tobacco products if any gift or other item other than cigarettes or smokeless tobacco is offered in consideration of the purchase.

(2) Retail Outlet Sales Practices. Except as otherwise provided in 940 CMR 21.04(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

(a) Selling cigarettes or smokeless tobacco products in any manner other than in a direct, face-to-face exchange without

the assistance of any vending machines or any other electronic or mechanical device, except as otherwise provided in 940 CMR 21.00;

(b) Failing to verify by means of valid government-issued photographic identification that each person purchasing cigarettes or smokeless tobacco is 18 years of age or older. No such verification is required for any person who appears 27 years of age or older;

(c) Using self-service displays of cigarettes or smokeless tobacco products;

(d) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel.

(3) Retail Outlet Prevention Measures. It shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to sell cigarettes or smokeless tobacco products to consumers without implementing all prevention measures reasonably necessary to prevent the sale of cigarettes or smokeless tobacco products to consumers younger than 18 years old. A person is presumed to have complied with this provision if such person has implemented the following prevention measures:

(a) For any retailer who employs six or more persons, undertaking an in-house secret shopper program at all retail outlets as a routine part of its business, and implementing and operating the prevention measure set forth in 940 CMR 21.04(3)(b). A retailer who receives during any calendar year official written notification from a state or local governmental authority of passing a tobacco compliance check is presumed to comply with this prevention measure for the next calendar year as to each retail sales outlet referenced in such notification as passing the compliance check;

(b) For any retailer who employs five or fewer persons, implementing and operating a training program for all employees who handle exchanges of cigarettes or smokeless tobacco products regarding compliance with laws prohibiting the sale of tobacco products to minors. A model training program for tobacco retailers is available to all retailers at the Office of the Attorney General;

(4) Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices. The following retail sales and retail sales outlet practices are not unfair or deceptive:

(a) Mail-order sales, excluding mail-order redemption of coupons and distribution of free samples through the mail, that are subject to verification that the purchaser is not younger than 18 years old. Verification of age through the mail shall consist of, at a minimum, ensuring that the person to whom the product is being sent supplies a legible photocopy of a valid government-issued identification;

(b) Vending machines that are located in facilities licensed under M.G.L. c. 138, § 12, to serve alcoholic beverages for consumption on the premises, if the vending machine:

1. is equipped with a lock-out device that locks out sales from the vending machine unless the locking mechanism is released by an outlet employee. The release mechanism must not allow continuous operation of the vending machine and must be out of the reach of all consumers and in a location accessible only to outlet personnel; and

2. is located within the immediate vicinity and exclusive control of outlet personnel such that all purchases are observable by the outlet employee(s) controlling the lock-out device; and

3. is posted with a sign stating that minors are not permitted to purchase tobacco and notifying customers of the lock-out device and identifying the outlet employee(s) to contact to purchase tobacco from the machine.

(5) Advertising Restrictions. Except as provided in 940 CMR 21.04(6), it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school.

(6) Exception to Prohibited Advertising Practices. The following advertising practice is not unfair or deceptive: A retailer may place one sign no larger than 576 square inches and containing only black text on a white background stating "Tobacco Products Sold Here" on the outside or visible from the outside of each location where such products are offered for sale.

21.05: Relation To Other Laws

Nothing in 940 CMR 21.00 shall relieve any person from liability at common law or under Massachusetts statutory law to any other person.

Nothing in 940 CMR 21.00 shall be construed to preempt any existing law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Nothing in this regulation shall prohibit any city, town or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which requires a permit or

license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Without limiting the generality of the foregoing, nothing in 940 CMR 21.00 shall prohibit any city, town, or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which imposes a monetary penalty, permit suspension or permit revocation for a violation of the local law. In cases where the ordinance, bylaw, regulation or rule is more restrictive than the provisions of 940 CMR 21.00, it shall control to the extent of any inconsistency with 940 CMR 21.00.

21.06: Severability

If any provision of 940 CMR 21.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 21.00 and the applicability of such provision to other persons or circumstances shall not be affected.

21.07: Effective Date

940 CMR 21.00 shall be effective on August 1, 1999.

Amendments to Cigarette and Smokeless Tobacco Regulations
(940 CMR 21.00)

(1/19/00)

Amend 940 CMR 21.03 (Definitions) to include the following definitions:

> Brand Name means a brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette or smokeless tobacco.
>
> Adult-Only Retail Facility means a facility where the retailer ensures that no person younger than 18 years old is present or permitted to enter at any time.

Amend 940 CMR 21.04(1)(d) (Retail Sales Practices) from:

(d) sale or distribution of cigarettes or smokeless tobacco products if any gift or other item other than cigarettes or smokeless tobacco is offered in consideration of the purchase.

to:

> (d) sale or distribution of cigarettes or smokeless tobacco products if any apparel or other merchandise (other than cigarettes or smokeless tobacco) which bears a brand name is offered in consideration of the purchase.

Amend 940 CMR 21.04(4) (Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices) to add:

> (c) Self-service displays that are located within adult-only retail facilities.
>
> (d) Within an adult-only retail facility, distribution of no more than one free sample per day to an individual adult. With respect to cigarettes, "sample" means one pack of cigarettes in the smallest size package distributed by the

manufacturer for individual consumer use. With respect to smokeless tobacco, "sample" means one can of smokeless tobacco in the smallest size can distributed by the manufacturer for individual consumer use.

Amend 940 CMR 21.04(5)(b) (Advertising Restrictions) from:

(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school.

to:

(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

Amend 940 CMR 21.07 (Effective Date) from:

940 CMR 21.00 shall be effective on August 1, 1999.

to:

940 CMR 21.00 shall be effective on February 1, 2000.

CODE OF MASSACHUSETTS REGULATIONS
TITLE 940: OFFICE OF THE ATTORNEY GENERAL
CHAPTER 22.00: SALES AND DISTRIBUTION OF CIGARS IN MASSACHUSETTS

(1/22/99)

22.01: Purpose

The Attorney General of Massachusetts promulgates 940 CMR 22.00 relating to cigar manufacturers and retailers pursuant to his authority in M.G.L. c. 93A, § 2(c). The purpose of 940 CMR 22.00 is to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts whereby:

(1) Massachusetts consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes by requiring the cigar industry to include health warnings on the package labels of cigars sold and distributed within Massachusetts and in the advertisements of such products within Massachusetts; and

(2) The incidence of cigar use by children under legal age is addressed by imposing requirements and restrictions on the sale and distribution of cigars in Massachusetts in order to prevent access to such products by underage consumers.

22.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a) and they do not legitimize acts or practices not specifically prohibited by 940 CMR 22.00.940 CMR 22.00 is designed to supplement existing regulations. All references in 940 CMR 22.00 to statutes and other regulations shall include amendments made to such statutes and regulations after the effective date of 940 CMR 22.00.

940 CMR 22.00 shall apply to any person who manufactures, packages, imports for sale, sells or distributes within Massachusetts cigars and little cigars as defined in these regulations.

940 CMR 22.00 shall not apply to the manufacture, packaging, importation for sale or distribution within Massachusetts of any tobacco product other than cigars and little cigars as defined in 940 CMR 22.00.

22.03: Definitions

Cigar means any roll of tobacco wrapped in either leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq.), and as to which 1,000 units weigh more than three pounds.

Little cigar means any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, et seq.) and as to which one thousand units weigh not more than three pounds.

Manufactured cigar means any roll of tobacco wrapped by machine in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 et seq.). Hand rolled cigar means any cigar which is not a manufactured cigar.

Hand rolled cigar means any cigar which is not a manufactured cigar.

Package means a pack, box, carton, container or individual wrapping of any kind in which cigars or little cigars are offered for sale, sold, or otherwise distributed to consumers.

Sale or distribution shall be defined to include sampling or any other distribution not for sale.

Manufacturer means any person, including any repacker and/or relabeler, who manufactures, fabricates, assembles, processes, or labels a finished cigar or little cigar.

Distributor means any person who furthers the distribution of cigars or little cigars, whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption.

Point of sale means any location at which a consumer can purchase or otherwise obtain cigars or little cigars for personal consumption.

Retailer means any person who sells cigars or little cigars to individuals in Massachusetts for personal consumption, or who operates a facility located within Massachusetts where vending machines are located.

Secret shopper program shall be defined to include, at a minimum, six visits per year to a retail sales outlet by a person retained by a retailer, where the person poses as a customer in order to ensure compliance by the outlet's employees with laws prohibiting the sale of tobacco to minors, with each visit made on a different day and at a different time, and, where practical, to a different outlet employee.

Advertisement (including the terms "advertise" and "advertising") means any oral, written, graphic, or pictorial statement, made by, or on behalf of, any person who manufactures, packages, imports for sale or distributes or sells within Massachusetts cigars or little cigars, the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display or visual image of any kind, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or

identifiable with, those used for any brand of cigar or little cigars. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less. The terms "advertisement," "advertise," and "advertising" shall be interpreted in a manner which is consistent with the definition of the same terms in the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

Clear and Conspicuous shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.00.

Playground means any outdoor premises or grounds owned or lawfully operated by or on behalf of, the State, any State agency, or any political subdivision of the State, or any public, private or parochial school, any child day care center or any youth center, which contains any device, structure or implement, fixed or portable, used or intended to be used by persons under the age of eighteen for recreational or athletic purposes including, but not limited to, play equipment such as a sliding board, swing, jungle gym, sandbox, climbing bar, wading pool, obstacle course, swimming pool, see-saw, baseball diamond, athletic field, or basketball court.

22.04: Labeling Requirements

(1) General Rule. It shall be an unfair or deceptive act or practice for any person to manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or manufactured little cigar the package of which does not bear, in accordance with the requirements of 940 CMR 22.00, one of the following labels:

WARNING: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug.

WARNING: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products.

(2) Label Format. It shall be an unfair or deceptive act or practice for any person to manufacture, package, import for sale or distribute within Massachusetts any manufactured cigar or little cigar the package of which fails to contain the warning statement required by 940 CMR 22.04(1) in the following format:

(a) On the front or top of the package, whichever surface area is larger, in a clear and conspicuous format, comprising at least 25% of the front or top panel of the package, with the warning statement capitalized as indicated in 940 CMR 22.04(1), with letters that are either white against a black background or black against a white background, and are in contrast with all other printed material on the package;

(b) The labels may either be printed directly on the package or preprinted, provided that any preprinted label is firmly attached to the package in such a way that the surface of the label is destroyed before the label can be removed from the package;

(c) If other warnings are required by any other Federal, State, or local governmental entity, the total area of all required warnings need not exceed 25% of the front or top of the package, provided that the warnings required by 940 CMR 22.00 remain clear and conspicuous.

(d) Label Rotation. It shall be an unfair or deceptive act or practice for any person to manufacture or import for sale or distribution within Massachusetts any brand of manufactured cigar or little cigar unless the label statements required in 940 CMR 22.04(1) are rotated by each manufacturer or importer regularly in alternating sequence on the packages of each brand of manufactured cigars or little cigars manufactured by the manufacturer or importer and in any advertisements for each such brand of manufactured cigars or little cigars.

22.05: Advertising Requirements

(1) General Rule. It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the advertising bears one of the warning statements specified in 940 CMR 22.04, rotated in accordance with the requirements of 940 CMR 22.04.

(2) Advertising Format. It shall be an unfair or deceptive act or practice for any person to advertise or cause to be advertised within Massachusetts any cigar or little cigar unless the warning statement required by 940 CMR 22.04 comprises 20% of the area of the advertisement and is in the format required by 940 CMR 22.04(2).

22.06: Point of Sale Restrictions

(1) Retail Sales Practices. Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:

(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars;

(b) breaking or otherwise opening any little cigar package to sell or distribute individual little cigars or a number of unpackaged or repackaged little cigars;

(c) distribution of cigars or little cigars through the mail, including redemption of coupons, credits and proofs-of-purchase, except as otherwise provided in 940 CMR 22.00;

(d) sale or distribution of cigars or little cigars if any gift or item other than cigars or little cigars is offered in consideration of the purchase;

(2) Retail Outlet Sales Practices. Except as otherwise provided in 940 CMR 22.06(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or

little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

(a) Selling cigars or little cigars in any manner other than in a direct, face- to-face exchange without the assistance of any vending machines or any other electronic or mechanical device, except as otherwise provided in 940 CMR 22.00;

(b) Failing to verify by means of valid government-issued photographic identification that each person purchasing cigars or little cigars is 18 years of age or older. No such verification is required for any person who appears 27 years of age or older.

(c) Using self-service displays of cigars or little cigars;

(d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel;

(e) As to any retailer who sells hand rolled cigars, or who displays for purchase manufactured cigars outside of their original package, failing to display a sign containing one of the warning statements required by 940 CMR 22.04 in a clear and conspicuous format, a minimum of 50 square inches in size, and in a location readily visible to the consumer.

(3) Retail Outlet Prevention Measures. It shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to sell cigars or little cigars to consumers without implementing all prevention measures reasonably necessary to prevent the sale of cigars or little cigars to consumers younger than 18 years old. A person is presumed to have complied with this provision if such person has implemented the following prevention measures:

(a) For any retailer who employs six or more persons, undertaking an in-house secret shopper program at all retail outlets as a routine part of its business, and implementing and operating the prevention measure set forth in 940 CMR

22.06(3)(b). A retailer who receives during any calendar year official written notification from a state or local governmental authority of passing a tobacco compliance check is presumed to comply with this prevention measure for the next calendar year as to each retail sales outlet referenced in such notification as passing the compliance check;

(b) For any retailer who employs five or fewer persons, implementing and operating a training program for all employees who handle exchanges of cigars or little cigars regarding compliance with laws prohibiting the sale of tobacco products to minors. A model training program for tobacco retailers is available to all retailers at the Office of the Attorney General.

(4) Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices: The following retail sales and retail sales outlet practices are not unfair or deceptive:

(a) Mail-order sales, excluding mail-order redemption of coupons and distribution of free samples through the mail, that are subject to verification that the purchaser is not younger than 18 years old. Verification of age through the mail shall consist of, at a minimum, ensuring that the person to whom the product is being sent supplies a legible photocopy of a valid government-issued identification;

(b) Vending machines that are located in facilities licensed under M.G.L. c. 138, § 2, to serve alcoholic beverages for consumption on the premises, if the vending machine:

1. is equipped with a lock-out device that locks out sales from the vending machine unless the locking mechanism is released by an outlet employee. The release mechanism must not allow continuous operation of the vending machine and must be out of the reach of all consumers and in a location accessible only to outlet personnel; and

2. is located within the immediate vicinity and exclusive control of outlet personnel such that all purchases are

observable by the outlet employee(s) controlling the lock-out device; and

3. is posted with a sign stating that minors are not permitted to purchase tobacco and notifying customers of the lock-out device and identifying the outlet employee(s) to contact to purchase tobacco from the machine.

(5) Advertising Restrictions. Except as provided in 940 CMR 22.06(6), it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

(a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;

(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

(6) Exception to Prohibited Advertising Practices. The following advertising practice is not unfair or deceptive: A retailer may place one sign no larger than 576 square inches and containing only black text on a white background stating "Tobacco Products Sold Here" on the outside or visible from the outside of each location where such products are offered for sale.

22.07: Relation To Other Laws

Nothing in 940 CMR 22.00 shall relieve any person from liability at common law or under Massachusetts statutory law to any other person.

Nothing in 940 CMR 22.00 shall be construed to preempt any existing law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Nothing in 940 CMR 22.00 shall prohibit any city, town or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of tobacco products, or which regulates the sale, use, or distribution of tobacco products. Without limiting the generality of the foregoing, nothing in 940 CMR 22.00 shall prohibit any city, town, or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which imposes a monetary penalty, permit suspension or permit revocation for a violation of the local law. In cases where the ordinance, bylaw, regulation or rule is more restrictive than the provisions of 940 CMR 22.00, it shall control to the extent of any inconsistency with 940 CMR 22.00.

22.08: Severability

If any provisions of 940 CMR 22.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 22.00 and the applicability of such provision to other persons or circumstances shall not be affected.

22.09: Effective Date

940 CMR 22.00 shall be effective on August 1, 1999.

Amendments to Cigar Regulations
(940 CMR 22.00)

(1/19/00)

Amend 940 CMR 22.03 (Definitions) to include the following definitions:

> Brand Name means a brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigars or little cigars.
>
> Adult-Only Retail Facility means a facility where the retailer ensures that no person younger than 18 years old is present or permitted to enter at any time.

Amend 940 CMR 22.06(1)(d) (Retail Sales Practices) from:

> (d) sale or distribution of cigars or little cigars if any gift or item other than cigars or little cigars is offered in consideration of the purchase.

to:

> (d) sale or distribution of cigars or little cigars if any apparel or other merchandise (other than cigars or little cigars) which bears a brand name is offered in consideration of the purchase.

Amend 940 CMR 22.06(4) (Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices) to add:

> (c) Self-service displays that are located within adult-only retail facilities.
>
> (d) Within an adult-only retail facility, distribution of no more than one free sample per day to an individual adult. With respect to little cigars, "sample" means one pack of little cigars in the smallest size package distributed by the

manufacturer for individual consumer use. With respect to cigars, "sample" means one pack of cigars in the smallest size package distributed by the manufacturer for individual consumer use or, if such cigars are not distributed in packs, no more than five individual cigars.

Amend 940 CMR 22.06(5)(b) (Advertising Restrictions) from:

(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

to:

(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment.

Amend 940 CMR 22.09 (Effective Date) from:

940 CMR 22.00 shall be effective on August 1, 1999.

to:

940 CMR 22.00 shall be effective on February 1, 2000.

APPENDIX E

MASSACHUSETTS GENERAL LAWS ANNOTATED
PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE XV. REGULATION OF TRADE
CHAPTER 93A. REGULATION OF BUSINESS
PRACTICES FOR CONSUMERS PROTECTION

Ch. 93A, § 2. Unfair practices; legislative intent; rules and regulations:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

APPENDIX F

Examples of State and Local Restrictions On Tobacco Advertising

The following examples of state and local laws restricting tobacco advertising is intended to be illustrative, not exhaustive. Numerous other jurisdictions have enacted comparable limitations on tobacco advertising.

General prohibitions on outdoor advertising, subject to exceptions

– *Baltimore City Revised Code § 11-208* (adopted 1994).

Prohibits cigarette advertisements in any publicly visible location. Exempts advertisements that are: (1) inside establishments owned by a holder of a cigarette business license; (2) on commercial vehicles used for transporting cigarettes; (3) on identifying signs that contain the name or slogan of the premises used by a holder of a cigarette business license; (4) on signs that refer to cigarettes only by way of a generic description; (5) on neon or electrically charged signs on premises used by a holder of a cigarette business license that is part of a promotion of a particular brand; (6) on signs on Maryland Transit Authority vehicles or taxis; (7) on signs on property owned, leased, or operated by the Maryland Stadium Authority; (8) on signs at certain horse racing facilities; (9) on signs on property adjacent to interstate highways; (10) on signs located in certain zoned areas; and (11) on signs, other than billboards or freestanding signboards, approved by the Zoning Board.

– *Chicago Municipal Code § 5.17* (adopted 1997).

Prohibits cigarette advertising in publicly visible locations, including outdoor billboards, sides of buildings, and freestanding signboards. Exempts tobacco advertisements that are: (1) inside the premises of licensed retailers; (2) on commercial vehicles; (3) used to identify a licensed retailer's premises; (4) generic advertising; (5) signs at certain special

events; (6) signs on Chicago transit vehicles; (7) signs at certain sports facilities; (8) signs adjacent to interstate highways; and (9) signs in commercial or manufacturing zones.

– *Milwaukee Municipal Code § 244-20* (adopted 1998).

Prohibits tobacco advertising in a "publicly visible" location, including billboards, roofs and sides of buildings, water towers, and freestanding signboards. Restricts indoor signs that face the street to "tombstone" format. Exempts: (1) signs facing inside a licensed premise selling tobacco products; (2) signs on certain commercial vehicles; (3) generic signs; (4) signs in a sports arena, stadium, or convention facility; (5) signs on property adjacent to and facing an interstate highway; and (6) signs in any industrial district that is not within 500 feet of a school, church, playground, community center, or day care center.

– *Oakland, CA Sign Code §§ 1602, 1603* (adopted 1997).

Prohibits tobacco advertising in publicly visible locations, including billboards, signs attached to the sides of buildings, signs attached to poles, posts or other figures, and freestanding signboards on the sidewalk. Exempts certain designated areas, provided that signs in these areas must not face into adjacent areas and must not be within 1,000 feet of schools, city-owned youth recreation centers, childcare facilities, places of worship, or Raimondi Field. Exempts: (1) signs inside premises that sell tobacco products; (2) signs on certain commercial vehicles; (3) signs that identify the premises; (4) generic signs; (5) signs on taxicabs; and (6) signs adjacent to and facing an interstate highway.

– *San Diego Municipal Code § 58.0303 - § 58.0306* (adopted 1998).

Generally prohibits outdoor tobacco advertising in a publicly visible location. Exempts advertising in certain areas of commercial or industrial zones that are not within 1,000 feet of any school, park, playground, library, childcare center, arcade, or recreation center. Also exempts: (1) certain commercial vehicles; (2) public service messages communicating the hazards of tobacco; (3) generic signs; and (4) certain public

facilities subject to existing contracts. Also prohibits, for stores within 1,000 feet of the earlier listed locations, any tobacco advertising below 4 feet from the floor, within 2 feet of candy, snacks, or non-alcoholic beverage displays, and publicly visible signs in store windows and doors. These latter restrictions do not apply to establishments that prohibit minors or to anti-tobacco public service messages.

Restrictions on outdoor advertising within 500 feet of certain locations

– *Ky. Rev. Stat. Ann. § 438.047* (enacted 1992).

Prohibits tobacco advertising on billboards with display space larger than 50 square feet located within 500 feet of any elementary or secondary school building or adjacent school-owned property.

– *Long Beach, N.Y. Code of Ordinances § 3-15* (adopted 1998).

Prohibits outdoor tobacco advertising within 500 feet of any school building, playground, child care day care center, amusement arcade, or youth center. The prohibition extends to billboards, roofs and sides of buildings, rolling shutters or gates, enclosures into which rolling shutters or gates retract, water tanks and towers, and free-standing signboards. Grandfathers certain awning signs for one year. Also prohibits indoor tobacco advertisements in the same area that are within 5 feet of any exterior window or any door which is used for entry or egress by the public. Exempts indoor advertisements that are (a) parallel to the street and facing inward, or (b) affixed to a wall panel or similar fixture that is perpendicular to the street. Allows a single "tombstone" sign statement no larger than 6 square feet and placed within 10 feet of an entrance to an establishment that sells tobacco. Allows manufacturer, distributor, or retailer to place its corporate name on its building, if it is not a brand name or trademark. Exempts any advertising on a motor vehicle.

Restrictions on outdoor advertising within 1,000 feet of certain locations

– *Cal. Bus. & Prof. Code § 22961* (enacted 1997).

Prohibits outdoor billboard tobacco advertising within 1,000 feet of any school or public school. Provides that this ban should not be construed to prohibit the display of an advertisement opposing the use of tobacco products.

– *Texas Health & Safety Code § 161.122* (enacted 1993, amended 1997).

Prohibits the advertisement of cigarettes or tobacco products within 1,000 feet of a church or school. Exempts signs in certain professional sports facilities. Grandfathers certain existing signs not closer than 500 feet to a church or school.

– *Atlantic City, NJ Code § 208-1* (adopted 1998).

Prohibits tobacco advertisements in a publicly visible location on or within 1,000 feet of the perimeter of any school, school bus stop, day care center, park, playground, youth center, or place of worship. Prohibition extends to billboards, roofs and sides of buildings, water towers, and free-standing signboards, and doors or windows reasonably visible to the public from the outside at a distance of 2 feet from such doors or windows. Exempts any location intended to be visible only by those inside a premises. Exempts any "tombstone" sign or poster no larger than 6 square feet within 10 feet of an establishment's entrance containing certain words. Exempts any advertisement on a licensed taxicab or autobus.

– *Denver Revised Municipal Code § 24-14.5* (adopted 1998).

Restricts the amount of tobacco advertising on "general outdoor advertising devices," which include billboards, bus benches, and other signs visible to the public, but this restriction excludes signs that are on the property where the tobacco product is available. Prohibits "publicly visible" advertising within 1,000 feet of the perimeter of any school, public park, or recreation center. Prohibits placing or advertising tobacco products less than 3 feet above the floor level in any premises where children

are allowed. Exempts tobacco-only stores that prohibit access to unaccompanied minors, as long as the advertisement is not visible from public property, and permits such stores to place their name on one outdoor sign. Allows arenas and stadiums where there is a performance area from which the public is excluded to advertise and promote a sponsor's product on the walls surrounding the performance area during a special event lasting no longer than 21 days. Also allows the sponsor's name to be placed on up to two outdoor marquees on the arena or stadium during the special event.

– *Little Rock, AR Ordinance No. 17,513, §§ 3(c), 4(b)* (adopted 1997).

Prohibits tobacco advertising on billboards, benches, or other forms of outdoor advertising within 1,000 feet of any school or playground. Also prohibits tobacco advertising in amusement parks and arcades. Restricts tobacco advertising in store front windows and exteriors that face a school or playground to not more than 15% of the surface area.

– *Los Angeles County Code § 22.52.840(H)* (adopted 1998).

Prohibits outdoor tobacco advertising signs within a residential or agricultural zone, or within 1,000 feet of any school, park, playground, recreational facility, youth center, child care center, entertainment park, or church. Exempts signs located on property adjacent to, and designed to be viewed primarily by, persons traveling on a freeway.

– *Los Angeles Municipal Code §§ 45.22 - 45.23* (adopted 1998).

Prohibits tobacco sign advertising "on-site" and "off-site" in publicly visible locations within 1,000 feet of any residential zone, residential use, park, school, playground, religious institution, or entertainment park. Exempts: (1) certain signs inside a tobacco retail store unless such sign is within 3 feet of any window or door in such a manner that is visible from outside the building; (2) signs located in a stadium if not visible from outside the stadium; (3) signs that are all non-commercial or that oppose tobacco use; (4) signs that identify the name of the establishment; (5) signs containing only generic descriptions

of tobacco products; and (6) signs on certain commercial or mass transit vehicles or in certain other specified areas.

– *New York City Admin. Code § 27-508.3* (adopted 1998).

Prohibits outdoor tobacco advertising within 1,000 feet of any school building, playground, child care day care center, amusement arcade, or youth center. The prohibition extends to billboards, roofs and sides of buildings, rolling shutters or gates, enclosures into which rolling shutters or gates retract, water tanks and towers, and free-standing signboards. Grandfathers certain awning signs for two years. Also prohibits indoor tobacco advertisements in the same area that are within 5 feet of any exterior window or any door which is used for entry or egress by the public. Exempts indoor advertisements that are (a) parallel to the street and facing inward, or (b) affixed to a wall panel or similar fixture that is perpendicular to the street. Allows a single "tombstone" sign statement no larger than 6 square feet and placed within 10 feet of an entrance to an establishment that sells tobacco. Allows manufacturer, distributor, or retailer to place its corporate name on its building, if it is not a brand name or trademark. Exempts any advertising on a motor vehicle.

– *Warren, MI Code of Ordinances §§ 4A-14, 4A-48* (adopted 1998).

Prohibits tobacco billboards in any publicly visible location on or within 1,000 feet of any school or playground. Exempts billboards not exceeding 400 square feet in certain industrial zones, provided that it is not within 500 feet from any residential use. Exempts public service billboards that communicate hazards of tobacco.

Restrictions on outdoor advertising within 1,400 feet of certain locations

– *Berkeley, CA Municipal Code § 20.66.030* (adopted 1998).

Prohibits outdoor tobacco advertising within 1,400 feet of schools, including billboards, posters, and signs. This prohibition extends to advertisements placed in the window of

a commercial establishment if visible from the street. Exempts generic signs on or in commercial establishments, as well as signs on taxicabs and certain commercial vehicles.

Restrictions on outdoor advertising within 1,600 feet of certain locations

– *Antioch, CA Municipal Code § 9-5.19* (adopted 1999).

Prohibits tobacco advertising and signage on the outside or in the windows of stores within 1,600 feet of schools, playgrounds, or playing fields.

– *Brentwood, CA Code of Ordinances §§ 8.36.20, 8.36.30* (adopted 2000).

Prohibits outdoor tobacco advertising within 1,600 feet of a school or public playground. Exempts signs located inside a commercial establishment, unless such sign is visible from the outside; signs on vehicles; and certain generic signs.

Restrictions on indoor advertising

– *National City, CA Municipal Code § 9.38.040* (adopted 2000).

Prohibits the display or advertisement of tobacco products within 2 feet of candy, soda, or snacks in any store that is within 1,000 feet of a school, playground, recreation center, childcare center, or library. Exempts commercial establishments that prohibit minors.

(2) (2)

Nos. 00-596, 597

Supreme Court, U.S.
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NOV 16 2000
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IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., ET AL.,

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., ET AL.

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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36pp

QUESTIONS PRESENTED

1. Whether state regulations that restrict the display of tobacco advertising near schools and playgrounds are pre-empted by the Federal Cigarette Labeling and Advertising Act ("Act"), where the regulations do not affect the federally mandated health warning on cigarette labeling or advertising and are well within the state police powers that Congress intended to preserve.

2. Whether a First Amendment challenge to state regulations that restrict the display of tobacco advertising near schools and playgrounds should be reviewed under the strict scrutiny standard applicable to content-based restrictions of noncommercial speech.

3. Whether the First Circuit correctly applied the fourth prong of the *Central Hudson* test to hold that the school and playground zones within which tobacco advertising is restricted are not more extensive than necessary to further the State's goal of reducing youth tobacco use.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondent Thomas F. Reilly, as Attorney General of Massachusetts, hereby submits this brief in opposition to the petition for a writ of certiorari.

OTHER CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

In addition to the constitutional, statutory and regulatory provisions set forth in the Petition and its appendix, the following statutory provision is involved.

Section 2 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1331, provides:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

STATEMENT OF THE CASE

In an effort to reduce youth tobacco use, the Attorney General of Massachusetts proposed regulations in May 1998 to address various marketing practices that promote the illegal sale or distribution of tobacco products to minors. *See* Mass. Gen. Laws c. 270, § 6 (providing criminal penalties for sale of any tobacco product to persons under 18). After a public hearing and receipt of extensive written comments, the Attorney General promulgated final regulations on January 8, 1999, now codified at 940 Code Mass. Reg. §§ 21.00 and 22.00. App. 105a-126a.

The regulations impose affirmative requirements on retailers, such as the mandatory verification of the age of all tobacco purchasers appearing to be under 27, and prohibit retail practices known to facilitate minors' access to tobacco, such as the use of "self-service" tobacco product displays and the distribution of free samples. 940 C.M.R. §§ 21.04(1) and (2)(c). App. 109a-109a. The regulations also restrict tobacco advertising in locations near schools and playgrounds, where children will see it frequently and involuntarily. In particular, the regulations prohibit "[o]utdoor advertising, including advertising . . . from within a retail establishment that is directed toward or visible from the outside of the establishment" in any location that is within a 1,000 foot radius of any school or public playground. 940 C.M.R. § 21.04(5)(a). For retailers located in these areas, the regulations also prohibit interior tobacco advertising placed at children's eye level (*i.e.* lower than five feet from the floor). 940 C.M.R. §§ 21.04(5)(b). Retail outlets that do

not admit minors are exempt from the regulations' marketing and interior advertising restrictions. App. 113a-114a.[1]

The regulations were promulgated following the publication of findings by the U.S. Food and Drug Administration (FDA), the Surgeon General of the United States and the Institute of Medicine of the National Academy of Sciences that tobacco advertising influences minors to use tobacco products. First Circuit Joint Consolidated Appendix (hereafter "JCA") at 1203, 1224, 1330-1368, 1377, 1398, 1442, 1513, 1535, 1595, 1617.[2] In 1995, the U.S. Centers for Disease Control (CDC) recommended "eliminating or severely restricting all forms of tobacco product advertising and promotion to which young persons are likely to be exposed" as part of an overall approach to youth tobacco use. JCA 1643. Indeed, in 1990 the cigarette industry adopted a voluntary advertising code that prohibits cigarette advertising on bill-

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[1] The regulations also allowed a retailer, at its discretion, to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here'" on the outside of, or visible from, the retail premises. 940 C.M.R. § 21.04(6). The district court held this so called "tombstone" provision preempted and the Attorney General did not appeal that ruling. App. 6a.

[2] In particular, the FDA concluded in 1996 that "cigarette and smokeless tobacco advertising has a powerful appeal to children and adolescents" and that "[tobacco] advertising plays a material role in the decision by those under 18 to use tobacco products." JCA 1513, 1519. These and other findings prompted the Agency to propose that tobacco advertising be restricted as part of governmental efforts to reduce youth tobacco use. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996). Although the Court subsequently held that the FDA lacks the statutory authority to regulate tobacco products, it relied on the Agency's findings in reaching that conclusion. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1302, 1305, 1315 (2000).

boards that are within 500 feet of any school or children's playground. JCA 805, 1398-1399.

Extent of Restrictions on Petitioners' Advertising

On November 23, 1998, Massachusetts entered into a multi-state agreement, known as the Master Settlement Agreement (or "MSA"), which resolved the States' litigation against the cigarette industry. Under the MSA, the petitioner cigarette companies are prohibited from displaying any outdoor advertising (including on billboards) or transit advertising. The MSA also prohibits advertising signs and placards in shopping malls, video arcades, arenas, and stadiums, whether or not the facility is open air or enclosed. Under the MSA, the sole exception to these outdoor advertising restrictions is the display of posters or placards, no larger than 14 square feet, at retail outlets selling cigarettes. JCA 469, 497-498. Consequently, to achieve compliance with the Massachusetts regulations, petitioners need only: (i) remove these exterior posters or placards from retail outlets within the school and playground zones, and (ii) insure that interior retail tobacco advertising is directed at adults (*i.e.* placed at least five feet above the floor).

Petitioners' repeated assertion that the regulations impose a "virtual ban" on tobacco advertising in Massachusetts is a significant overstatement. *See* Petition at 23, 26, 28. The regulations place no restrictions on petitioners' advertising in areas outside the school and playground zones, nor do they affect advertising in magazines, newspapers and other

media.[3] Instead, the regulations extend, incrementally, existing statutory, judicial and contractual restraints that are in place to reduce the exposure of children to tobacco advertising. The regulations do not prohibit advertising targeted to adults. The First Circuit specifically rejected petitioners' assertion that the regulations amount to a "blanket ban" on speech. App. 35a.

Even before the MSA was executed, the tobacco industry had long observed restrictions on its advertising. In 1969, Congress enacted a ban on cigarette advertising on television and radio, 15 U.S.C. § 1335,[4] and in 1986 extended this prohibition to smokeless tobacco advertising. 15 U.S.C. § 4402(f). One state, Utah, has entirely prohibited outdoor tobacco advertising since 1929. Utah Code 76-10-102 (1995 Replacement). As noted above, in 1990 the cigarette companies voluntarily eliminated billboard advertising within 500 feet of schools and playgrounds. After the companies implemented this policy, a number of states and localities enacted similar provisions. *See, e.g.*, App. 131a, citing Texas Health and Safety Code § 161.122 (prohibiting, with certain exceptions, tobacco advertisements within 1,000 feet of a church or school).

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[3] Petitioners' assertion that the advertising regulation "often covers as much as 90% of the populated areas in the jurisdiction" is also an overstatement. Petitioners base this assertion on a study — challenged below — which was limited to Massachusetts' three largest (and presumably most densely built) cities: Boston, Worcester and Springfield. App. 39a, 79a.

[4] This statute was upheld largely because "[s]ubstantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people." *Capital Broadcasting Company v. Mitchell*, 333 F. Supp. 582, 585-586 (1971), *summarily aff'd* 405 U.S. 1000 (1972).

Prior Proceedings and Decisions

On May 21, 1999, petitioner cigarette manufacturers filed this action in the United States District Court for the District of Massachusetts. These companies claimed preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"), 15 U.S.C. §§ 1334(b), of both the regulations' restrictions on tobacco advertising and the regulations' bans on free product giveaways and the sale of tobacco products through the mail without age verification. App 48a-49a. Petitioners also claimed that the advertising restrictions and the prohibition of self-service tobacco displays violate the First Amendment. JCA 17-93. Shortly thereafter, the petitioner smokeless tobacco and cigar companies filed similar actions in the same court.

On December 2, 1999, the district court (Young, C.J.) granted summary judgment for the Attorney General on petitioners' preemption claim. App. 46a, 59a-60a. The district court identified the decisive issue as whether the challenged regulations constitute a requirement or prohibition "based on smoking and health," as that phrase is used in the FCLAA's preemption clause, Section 1334(b). App. 51a. The court found it significant that Congress expressly stated its purpose with respect to preemption — to prevent nonuniform cigarette labeling and advertising regulations "with respect to any *relationship between smoking and health*." App. 54a, quoting 15 U.S.C. § 1331 (emphasis in opinion). The court found that the Massachusetts advertising regulations "do not implicate the relationship between smoking and health. Rather, they 'simply restrict the location of cigarette-advertising signs, irrespective of the nature of the message communicated.'" App. at 56a, quoting *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1324 (4th Cir. 1995).

The district court also granted, in substantial part, the Attorney General's motion for summary judgment on petitioners' claims under the First Amendment. App. 104a. Applying the test for review of commercial speech regulations set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the court concluded that "the Attorney General has provided substantial evidence showing that regulation of tobacco advertising would substantially advance its interest in curtailing underage smoking." App. 75a. The district court found, with respect to the outdoor advertising regulation, that the defined school and playground zones were sufficiently narrowly tailored, but held that the Attorney General had not supported his view that minors would also more frequently enter retail stores within the 1,000 foot zones, and so held this latter provision invalid. App. 78a-83a.

The First Circuit affirmed the district court's decision with respect to preemption. Relying on recent decisions of the Second and Seventh Circuits, the court rejected petitioners' argument that the FCLAA preempts all state regulations "with respect to [tobacco] advertising." App. 9a-12a. Considering the FCLAA's preemption clause and its express statement of purpose, the court concluded "that Congress sought to inform the public of the health risks associated with smoking, and . . . to protect the national economy from the burdens that would result from a multitude of 'diverse, nonuniform, and confusing' advertising standards." App. 10a, quoting *Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 106 (2nd Cir. 1999). The court found that Massachusetts' location-based restriction "do[es] not touch upon Congress's 'comprehensive Federal program' to control cigarette advertising information." *Id.* Although the court recognized that states and municipalities might impose differing regulations with regard to the location of tobacco advertising, it concluded that these were "not the kind of 'diverse, nonuniform, and confusing' advertising standards with

which Congress was concerned when it enacted the FCLAA." App 13a, citing 15 U.S.C. § 1331.

The First Circuit also upheld the advertising regulations under the First Amendment. Applying the *Central Hudson* test, the court found "that the Attorney General has offered sufficient product-specific evidence regarding cigarettes, smokeless tobacco, and cigars to demonstrate that the dangers posed by underage use of each is a 'real harm' and that the regulations can be reasonably expected to alleviate those harms to a material degree." App. 21a. The court concluded that the advertising restrictions would reduce the visibility of tobacco products to minors and eliminate "the psychological incentives to tobacco use presented by things as simple as attractive ad color and design," which the court agreed "may reasonably be assumed to have a greater effect on young people." App. 28a-29a. Under *Central Hudson*'s final prong, the court found the regulations sufficiently narrowly tailored because of their "obvious connection to the state's interest in protecting minors, which is served directly by limiting application of the regulations to areas near schools and playgrounds — areas where children are more likely to be." App. 30a.

REASONS FOR DENYING THE WRIT

I. THE PREEMPTION CLAIM DOES NOT MERIT PLENARY REVIEW.

A. The FCLAA Preemption Question is of Limited Importance and the Lower Courts, with a Single Exception, Have Consistently and Correctly Applied the Holding of *Cipollone v. Liggett Group, Inc.*

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court considered the proper construction of the express preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b). Petitioners now ask the Court to address the same statutory provision, in a case of dramatically less consequence than *Cipollone* on an issue as to which the lower courts are in agreement, save one contrary decision. *Cipollone* clearly provides the lower courts the necessary guidance for determining the preemptive reach of Section 1334(b) and obviates any need for the Court to accept this case to address FCLAA preemption.

In *Cipollone*, the Court considered whether, and to what extent, Section 1334(b) preempted common law claims for damages asserted by Rose Cipollone's estate against several cigarette manufacturers as a result of her death from lung cancer. 505 U.S. at 508. The issue was of manifest importance as it affected the rights of millions of people with smoking-related diseases who might bring state law claims against the cigarette companies. In the present case, the preemption issue has no similar importance to the administration of justice. The advertising restrictions in the MSA have, as practical matter, narrowed petitioners' obligations under the regulations to removal of certain small format retail advertising near schools and playgrounds. And, because al-

most all point-of-sale cigarette advertising is by the four cigarette petitioners here, the preemption issue affects, almost exclusively, only the parties before the Court. A decision on the unique question of FCLAA preemption would be of no importance to manufacturers or advertisers of other products.

To date, seven decisions of the courts of appeals have considered questions of preemption under Section 1334(b). Of these, six represent a consistent application of this provision under the framework set forth in *Cipollone*. In addition to the First Circuit, the Second, Fourth and Seventh Circuits have all held that state or local laws that regulate the location, but not the content, of cigarette advertising are not preempted under the FCLAA. In each case, the court of appeals found no indication that Congress intended, absent state or local interference with the uniform warning message mandated in the FCLAA, to frustrate the States' ability to protect the health and safety of their citizens and to regulate, as they historically have done, the location of commercial outdoor advertising. App. 9a-13a. *See Greater N.Y. Metro. Food Council,* 195 F.3d 100, 109 (2nd Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000); *Federation of Advertising Industry Representatives ("F.A.I.R.") v. City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000); *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1324 (4th Cir. 1995) *vacated and remanded on other grounds*, 518 U.S. 1030, *modified by* 101 F.3d 332 (4th Cir. 1996) *cert. denied* 520 U.S. 1204 (1997). Two other decisions represent a consistent application of Section 1334(b) in different circumstances. *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73-75 (2nd Cir. 1994) (holding that FCLAA preempts City ordinance that affects content of health message by requiring companies displaying advertising on New York taxis to carry one anti-smoking message for every four cigarette advertisements displayed); *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 76 (1st Cir.

1997) (holding that state law mandating disclosure of tobacco additives to state public health agency was not "with respect to advertising" and therefore not preempted by FCLAA).

Only the opinion of the Ninth Circuit in *Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir. 1999), amended at 203 F.3d 1150, represents a departure. In *Lindsey,* however, the Ninth Circuit engaged in only a brief discussion of Section 1334(b), noting that the County did not "contend that the plain language of the FCLAA fails to preempt its ban on outdoor tobacco advertisements." *Id.* at 1070. The court otherwise found no distinction, for preemption purposes, between local restrictions on the location of cigarette advertising and regulations that interfere with the advertising and labeling requirements of the Act. *Id.* at 1072. Consequently, the court held the County's outdoor advertising restrictions preempted. This single aberration does not present a conflict that warrants review. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (conflict in lower courts does not justify review unless "real and embarrassing").[5]

The fact that a number of states and localities have enacted restrictions on advertising similar in principle to the cigarette companies' voluntary code does not suggest that review is warranted. Contrary to petitioners' assertion, these states and localities were not "encouraged" to act by a conflict in judicial authority, Petition 18, as almost all of these laws predate the 1999 decision in *Lindsey*. App. 128a-134a.

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[5] The Court has denied certiorari in two of the FCLAA cases where review was sought after publication of the Ninth Circuit's decision in *Lindsey*. *See Greater N.Y. Metro. Food Council v. Giuliani,* 195 F.3d 100 (2nd Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000); *Federation of Advertising Industry Representatives v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999) *cert. denied* 120 S.Ct. 1671 (2000).

As explained below, there is no indication in the Act that Congress saw local laws restricting the placement of cigarette advertising as interfering with its objectives; indeed, such restrictions are entirely consistent with the Act's public health goals and with its ban on cigarette advertising on television and radio, also intended to protect children. 15 U.S.C. §§ 1331, 1333, 1335.

B. The First Circuit Correctly Held That a State Restriction on the Location of Cigarette Advertising Is Not Preempted by the FCLAA.

The petitioners' contention that the FCLAA preempts all state and local laws "with respect to" cigarette advertising was correctly rejected by First Circuit and does not merit review by this Court. There is no evidence in the Act that Congress intended to give cigarette manufacturers a special immunity — one not afforded to manufacturers of other consumer products — from state and local laws regulating the location of commercial advertising. Rather, Congress' objective was to provide a uniform health warning to the public about the dangers of cigarette use and, at the same time, to avoid a burden to national advertisers that would result from state or local laws that require different or additional health messages. 15 U.S. C. § 1331. The First Circuit correctly concluded that Massachusetts' restriction of the permissible locations for cigarette advertising, which does not affect the content of such advertising, is not preempted under Section 1334(b).

In *Cipollone*, the Court established a framework for consideration of preemption questions arising under Section 1334(b). That provision states:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b). Because Congress included a "provision defining the pre-emptive reach" of the FCLAA, the Court found its task was to "identify the domain expressly pre-empted by [Section 1334(b)]." 505 U.S. at 517. The Court emphasized that its analysis must "'start[] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (majority), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Consequently, the Court construed the text of Section 1334(b) narrowly to avoid unwarranted intrusion on the State's sovereign authority. *Id.* at 518 (majority); *see also id.* at 524 (plurality) (construction of Section 1334(b) must be "fair but narrow"); 532 (Blackmun, J., concurring in part and dissenting in part) (Court cannot find preemption "in the absence of clear and unambiguous evidence that Congress intended that result"). In determining the preemptive reach of Section 1334(b), *Cipollone* also considered the structure and purpose of the FCLAA as a whole, and its legislative history. *Id.* at 518-19 (majority), 528-529 (plurality), 534, 539-41 (Blackmun, J., concurring in part and dissenting in part).

The "domain" preempted by Section 1334(b) becomes evident when that provision is viewed against the structure and purpose of the Act. *See Cipollone,* 505 U.S. at 529 (considering purpose of 1969 Act in construing "smoking and health" clause). In Section 1331, Congress declared as its purpose "[t]o establish a comprehensive Federal program to deal with cigarette labeling and advertising *with respect to any relationship between smoking and health.*" (emphasis added). In the same section, Congress articulated two specific purposes. In furtherance of its first purpose, to adequately inform the public "about any adverse health effects of cigarette smoking," the Act makes it unlawful to sell or advertise cigarettes without specific warning labels set forth in a specific format. 15 U.S.C. §§ 1331, 1333.[6] To further its second purpose, to protect the national economy from the burden of nonuniform state or local advertising regulations "with respect to any relationship between smoking and health," Congress included the express preemption provision in the Act. 15 U.S.C. §§ 1331. *See Cipollone,* 505 U.S. at 514.

Section 1334(b) thus preempts state or local advertising regulations that require, or prohibit, smoking-and-health information on cigarette packages or with respect to cigarette advertising. *See, e.g., Vango Media, Inc.*, 34 F.3d at 74-75 (holding city ordinance preempted under Section 1334(b) that required certain advertisers to display one city-approved anti-smoking message for every four cigarette advertisements.). Congress sought to preempt such regulations, which implicate the "relationship between smoking and

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[6] Congress also prohibited the advertising of cigarettes and little cigars on television and radio in order to limit the exposure of young people to these promotions. 15 U.S.C. § 1335. The Act also establishes procedures for federal agencies and Congress to gather information, for purposes of possible legislative action, on the health consequences of smoking and on cigarette advertising practices and methods. 15 U.S.C. § 1337.

health" and interfere with the Act's uniform health warning. 15 U.S.C. §§ 1331.[7]

The Massachusetts regulations do not obstruct the FCLAA goal of a uniform national health warning on cigarette packages and advertising. In restricting the display of tobacco advertising near schools and playgrounds, the regulations do not prescribe or affect the content of cigarette advertising. Compliance will not require cigarette manufacturers to alter, or create, any advertising copy or modify any national or regional advertising campaign. As such, the regulations are entirely consistent with the purpose of the FCLAA to protect the national economy from the burden of "diverse, nonuniform" state and local cigarette advertising regulations "with respect to any relationship between smoking and health." 15 U.S.C. § 1331. Moreover, because Congress was clearly concerned with advertising directed to children, *see* 15 U.S. C. § 1335 (banning TV and radio advertising), it would contradict the Act's purpose to guarantee cigarette advertisers the right to advertise in areas children gather each day.

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[7] Similarly, in *Cipollone* the plurality held preempted only those common law claims *directly* implicating the health related content of cigarette advertising. *Compare Cipollone*, 505 U.S. at 524 (holding that Section 1334(b) preempted common law failure-to-warn claims to the extent such claims were predicated on a legal obligation to provide "additional, or more clearly stated, warnings") with *id.* at 528-29 (holding that state common law claim for fraudulent misrepresentation was not preempted because it did not depend on a requirement of specific health warnings, but instead was predicated on a requirement that advertising not be deceptive).

The plain language of the FCLAA refutes petitioners' contention that the Act preempts *any* regulation of cigarette advertising by the States. *See* Petition at 15, 17, 18.[8] Rather, Congress targeted a specific area of regulation — advertising requirements or prohibitions "based on smoking and health" — as off-limits to the States. 15 U.S.C. § 1334(b).[9] Petitioners ignore this express limitation on the reach of Section 1334(b). *See Cipollone,* 505 U.S. at 524 (plurality) ("... each phrase within [Section 1334(b)] limits the universe of common law claims pre-empted by the statute."). The petitioners' suggestion at page 16, n. 8, that "facially tobacco-specific" regulations are inevitably "based on smoking and health," reduces that critical phrase in Section 1334(b) to mere surplusage. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").[10] Petitioners' unrestrained view of the preemptive reach of Section 1334(b) has correctly been rejected by the First, Second, Fourth and Seventh Circuits and does not merit consideration by this Court. *See, e.g., Greater N.Y.*

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[8] *See* Petition at 15 ("In 1969, however, the preemption provision was completely rewritten, so that it now reaches beyond regulation of the content of advertising to any regulation 'with respect to' advertising.").

[9] The Senate Report accompanying the 1969 amendments to the Act emphasized this focus. "The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health." Senate Rep. No. 91-566, at 12 (1969), *reprinted in* 1970 U.S.C.A.A.N. 2652, 2663.

[10] By its plain language, Section 1334(b) preempts only a *subset* of "tobacco specific" regulations — those "based on smoking and health." *See Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 488 (1996) (discussion of FCLAA preemption provision). If, as petitioners argue, the provision preempted *all* "facially tobacco specific regulations" it would simply state: "No requirement or prohibition shall be imposed under state law with respect to the advertising or promotion of [properly labeled] cigarettes."

Metro. Food Council, 195 F.3d at 105 (plaintiffs' view of Section 1334(b) could "preempt every conceivable obligation having a relationship — however evanescent -- to the advertising and promotion of cigarettes"); *F.A.I.R. v. City of Chicago*, 189 F.3d at 638 (plaintiffs' view of preemption could prevent states and municipalities from restricting distribution of free cigarette samples).

Petitioners' expansive approach to FCLAA preemption would result in a broad incursion on the States' police powers. The legislative history of Section 1334(b) makes clear, however, that Congress intended precisely the opposite. "The Senate Report emphasized that [Section 1334(b)] . . . would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*." *Cipollone*, 505 U.S. at 529, n. 26 (plurality) (quoting Senate Report No. 91-566, p. 12 (1969)(emphasis in original). *See also id.* at 529-530, n. 27 (FCLAA legislative history "plainly expresses an intent to preserve the 'police regulations' of the States."). This Court long ago recognized that regulation of the location of cigarette advertising is well within the police power. *See Packer Corp. v. State of Utah*, 285 U.S. 105, 108 (1932) (upholding Utah ban on outdoor tobacco advertising). Because the Act does not disclose a "clear and manifest" Congressional purpose to preempt the States' sovereign authority in this area, the First Circuit correctly followed the rule established by the Second, Fourth and Seventh Circuits and held that the Massachusetts advertising regulations are not preempted. App. 11a.

In *Lindsey*, on the other hand, the Ninth Circuit erred in concluding that Congress granted cigarette advertisers blanket protection from the "burden . . . to consult local regulations concerning the placement of tobacco advertisements" in areas they wish to advertise. 195 F.3d at 1072. The *Lindsey* court nowhere tempered its broad literal reading of

Section 1334(b) against the presumption against preemption of state law and, as a result, ultimately failed to follow *Cipollone*'s mandate to give Section 1334(b) a fair but narrow reading. 505 U.S. at 524. In particular, the court gave the phrase "based on smoking and health" from Section 1334(b) its broadest possible meaning — finding it applicable where the local law "pertains to matters of health and safety of the citizens of Pierce County." 195 F.3d at 1070.[11] That broad construction virtually guarantees that the Act will significantly impair a State's exercise of its police regulations, a result that Congress certainly sought to avoid. *See Cipollone*, 505 U.S. at 529, n. 26, 529-530, n. 27.

II. THIS CASE PRESENTS NO OCCASION TO ADOPT A NEW ANALYSIS FOR REVIEW OF LIMITED RESTRICTIONS ON COMMERCIAL SPEECH.

Both the district court and the First Circuit held that the Massachusetts regulations satisfy the intermediate scrutiny test established in *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), for review of

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[11] *Lindsey* also erred in concluding that the 1969 amendments to the Act supported preemption of the County's advertising regulation. 195 F.3d at 1073-74. The *Cipollone* plurality emphasized that, although the Act's preemption language was amended in other respects in 1969, Congress retained the important "smoking and health" limitation it had originally included in the clause. *Cipollone*, 505 U.S. at 529 (plurality) ("[T]he phrase 'relating to smoking and health' * * * was essentially unchanged by the 1969 Act * * *."); *see also id.* at 539-42. As a result, the 1969 Act continued to preempt only state law requirements or prohibitions concerning the health-related content of cigarette advertising. *Cf. id.* at 519-20 (1965 Act "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements * * *.").

restrictions on commercial speech.[12] App. 14a-37a; 64a-88a. In so ruling, the First Circuit was in accord with the Fourth Circuit, which earlier upheld under the First Amendment a Baltimore ordinance prohibiting outdoor tobacco advertising in certain parts of that city. *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1325-26 (4th Cir. 1995) *vacated and remanded,* 518 U.S. 1030, *modified by* 101 F.3d 332 (4th Cir. 1996) *cert. denied* 520 U.S. 1204 (1997).[13] These are the only circuits that have reviewed such restrictions under the First Amendment. Consequently, there is no division of authority among the courts of appeal on this issue and petitioners otherwise fail to identify adequate reasons for the Court to review the First Amendment question.

Because petitioners' challenge failed under the well established *Central Hudson* test, they now ask the Court to review the regulations under a strict scrutiny standard deriving from the Court's precedent concerning political and other "core"

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[12] That test first inquires whether the speech at issue concerns a lawful activity and is not misleading; if not, it has no First Amendment protection. *Central Hudson*, 447 U.S. at 566. The government may regulate non-misleading commercial speech concerning a lawful activity where (i) the asserted governmental interest in regulating the speech is substantial, (ii) the regulation directly advances the governmental interest asserted, and (iii) the regulation is not more extensive than necessary to serve that interest. *Id. See, e.g., Greater New Orleans Broadcasting Ass'n., Inc. v. United States,* 527 U.S. 173, 183-196 (1999) (applying *Central Hudson* test).

[13] After the Fourth Circuit's first opinion in *Penn Advertising*, this Court vacated the judgment and remanded the case for further consideration in light of *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). 518 U.S. 1030. On remand, the Fourth Circuit modified, but readopted, its prior decision upholding the ordinance under the First Amendment. 101 F.3d 332. The Court thereafter denied the advertisers' petition for writ of certiorari. 520 U.S. 1204 (1997).

speech.[14] This case would, however, present precisely the wrong vehicle for reconsideration of the *Central Hudson* test. Nothing in the Court's cases suggests a need for heightened review where, in the interest of protecting children, the government has imposed a targeted restriction on commercial speech that leaves ample room for advertising to adults. Indeed, the government has more latitude to regulate even noncommercial speech where its purpose is to protect children from particular risks associated with it. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (plurality) (protection of children an "extremely important justification" for speech restriction).[15] Because *Central Hudson* provided an appropriate basis for the decision in this case, the Court should not "reach out to make novel or unnecessarily broad pronouncements on constitutional issues." *Greater New Orleans Broadcasting Assn., Inc.*, 527 U.S. at 184.

In urging a strict scrutiny standard, petitioners propose a significant and unwarranted alteration in the Court's First Amendment jurisprudence. They ignore the "'common-sense' distinction between speech proposing a commercial

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[14] Petitioners do not dispute that the regulations are applicable only to "commercial" speech. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (describing commercial speech as "speech which does no more than propose a commercial transaction."). The regulations restrict only "advertising," which is defined as "any oral, written, graphic, or pictorial statement . . . the purpose or effect of which is to promote the use or sale of the [tobacco] product." App. 107a (940 Code Mass. Reg. § 21.03).

[15] In addition, petitioners' proposal would, among other things, require the lower courts to revisit long settled restraints on the advertising of tobacco products to children. *See* 15 U.S.C. § 1335 (prohibiting television and radio advertising of cigarettes), upheld in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585-586 (D.D.C. 1971), *summarily aff'd* 405 U.S. 1000 (1972).

transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64 (1983), quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978). As the Court stated in *Ohralik*:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

436 U.S. at 456. *See also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("We have always been careful to distinguish commercial speech from speech at the First Amendment's core."); *R.A.V. v. St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring in judgment) ("If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech.").

Moreover, the specific arguments set forth in the Petition fail to raise a substantial issue concerning the First Amendment standard of review applicable here. The fact that the regulations concern only *tobacco* advertising, as opposed to advertising for other products, does not subject them to stricter First Amendment scrutiny under doctrines applicable

to "content" or "viewpoint" based regulation of noncommercial speech. In addition, as set forth below, the Massachusetts regulations implicate none of the particular concerns that some Justices have expressed in criticizing the limits of the *Central Hudson* test. This case therefore presents no issue under the First Amendment that warrants review.

A. The Regulations Implicate None of the Concerns That Have Prompted Criticism of the *Central Hudson* Test.

In a number of cases, the Court or individual Justices have expressed the concern that certain commercial speech restrictions call for either an exacting application of the *Central Hudson* test or more heightened review. The Massachusetts regulations do not, however, give rise to these concerns. Rather, such concerns are addressed to commercial speech restrictions that are directed at legitimate adult purchasers, are promulgated in the absence of direct regulation of the commercial conduct, and act as a total ban on speech.[16]

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[16] For example, in *Virginia Pharmacy Board* the Court criticized the State's "highly paternalistic approach" in forbidding the advertising of prescription drug prices and admonished that the State cannot "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." 425 U.S. at 770-773. In *Central Hudson*, the Court noted that it would "review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy . . . where a ban on speech could screen from public view the underlying governmental policy." 447 U.S. at 566 n.9. In his concurrence, Justice Blackmun challenged the application of the Court's new test "when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly." 447 U.S. at 573.

More recently, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), Justice Stevens (joined by Justices Kennedy and Ginsburg) stated

Consequently, this case presents no occasion to reconsider the *Central Hudson* test.

The regulations plainly are not directed at dampening the demand for tobacco products among *legitimate* purchasers. The purpose of the regulations is to "address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." App. 105a (940 Code Mass. Reg. § 21.01). The advertising restrictions achieve that goal by targeting themselves to areas near schools and playgrounds. The First Circuit correctly recognized that the regulations do not suggest the kind of paternalistic manipulation of adult consumer behavior criticized in this Court's cases. App. 18a-19a.

Moreover, the regulations support previously enacted legislation prohibiting the sale of tobacco to minors. Mass. G.L. c. 270, § 6. It is, in fact, the extensive advertising of tobacco products near schools and playgrounds that undermines the Commonwealth's policy against tobacco sales to minors. *Cf. U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) ("Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling.").

Finally, in the cases upon which petitioners rely, the Court's concern was directed at laws that imposed a blanket prohibition on speech. *See, e.g., 44 Liquormart, Inc.*, 517

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that "the First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id.* at 503. He went on to state that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes." *Id.* at 510. In his concurring opinion, Justice Thomas stated: "In cases . . . in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson* []should not be applied . . . ." *Id.* at 518.

U.S. at 504 ("[T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition" against speech.); *Central Hudson*, 447 U.S. at 558 (regulation "completely bans promotional advertising by an electrical utility"); *Virginia Pharmacy Bd.*, 425 U.S. at 752 (ban on advertising prices for prescription drugs). In this case, the First Circuit specifically rejected petitioners' contention that the regulations are a "blanket ban" on speech. App. 35a. Under the regulations, petitioners remain free to advertise tobacco products in areas outside the school and playground zones, and in magazines, newspapers and other media. Petitioners may also advertise inside retail outlets, in *any* location, by placing the advertising above children's eye-level (i.e. five feet). Consequently, the regulations do not invite further review.

B. The Fact that the Regulations Are Limited to Tobacco Products Does Not Subject Them to Strict Scrutiny Under Doctrines Applicable to Content Based Regulation of Noncommercial Speech.

As discussed above, the regulations do not require or prohibit any particular advertising content; rather, they simply restrict the display of tobacco advertising in certain locations where children gather. The regulations are limited to *tobacco* advertising, but for entirely permissible reasons. Such advertising promotes an addictive product with serious adverse health consequences which is illegal for sale to minors. Petitioners have shown no basis for strict scrutiny review.

Although "[i]in most other contexts, the First Amendment prohibits regulation based on the content of the message," the same is not true with respect to commercial speech. *Central Hudson*, 447 U.S. at 564 n.6. As the First Circuit noted, this Court "has made clear that even regulations which single

out the promotional speech of a particular industry are analyzed under the *Central Hudson* test." App. 14a-15a, citing *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 184 (applying *Central Hudson* to regulations restricting advertisements for casino gambling). In the realm of commercial speech, the government may have constitutionally legitimate reasons to regulate advertising with respect to one product or service, without applying the same restriction to other commercial dealings. *R.A.V.*, 505 U.S. at 388-389. "It is . . . beyond question that the Government may choose to limit advertisements for cigarettes, *see* 15 U.S.C. §§ 1331-1340, but not for cigars; choose to regulate airline advertising, but not bus advertising; or choose to monitor solicitation by lawyers, but not by doctors." *Id.* at 422 (Stevens, J., concurring) (citations omitted). In this case, the regulations restrict tobacco advertising directed to minors, who cannot legally purchase tobacco products. This is an entirely permissible distinction under the First Amendment.[17]

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[17] There is also no merit to the petitioners' suggestion that strict scrutiny is necessary because the regulations are "viewpoint-based." Petition at 24. As the First Circuit stated: "On their face, the regulations restrict the promotion of tobacco products, regardless of brand or manufacturer, and permit nonpromotional speech relating to tobacco products by any speaker, tobacco manufacturers and sellers included. The companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions. Under these circumstances, we do not see the danger of viewpoint discrimination . . . ." App. 15a-16a.

III. PETITIONERS' CHALLENGE TO THE GEOGRAPHIC PARAMETERS OF THE REGULATIONS RAISES ONLY A FACT-SPECIFIC QUESTION CONCERNING APPLICATION OF THE *CENTRAL HUDSON* TEST, AND THEREFORE PRESENTS NO BASIS FOR REVIEW.

Petitioners also ask the Court to review the First Circuit's application of the fourth prong of the *Central Hudson* test. Petition 26-29. Petitioners argue that, in restricting advertising to a distance of 1,000 feet from schools and playgrounds, the regulation is "more extensive than is necessary" to serve the State's concededly substantial interest in reducing youth tobacco use. *See Central Hudson*, 447 U.S. at 556 (quoting fourth prong of test). This assertion, that the First Circuit has incorrectly applied a properly stated rule of law, is not a basis for Supreme Court review. *See*-United States Supreme Court Rule 10.

Moreover, the fourth prong of the *Central Hudson* test accords the State the necessary leeway to draw lines. When the State frames a commercial speech regulation to address its substantial interest, the First Amendment demands "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served. [* * *] Within those bounds we leave it to the governmental decision makers to judge what manner of regulation may best be employed." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (internal citations and quotation marks omitted). The industry's voluntary advertising code already recognizes the propriety of a 500 foot "buffer" zone around schools and playgrounds. JCA 805, 1398-1399. Petitioners' complaint that the Attorney General, in enlarging this zone, has drawn the line in the wrong place, asks for unwarranted judicial second-guessing. *Fox*, 492 U.S. at 480-

481 (fourth prong analysis "take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive Branches needed leeway . . . .").

Nor can petitioners legitimately argue that the regulations are overbroad because they incidentally reduce the amount of tobacco advertising to which adults are exposed in the school and playground zones. *See Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 194 (government may "incidentally, even deliberately, restrict a certain amount of [commercial] speech not thought to contribute significantly to the dangers with which the Government is concerned," if it does so in order to achieve a broader, legitimate objective). The protection of children is an "extremely important interest" that can justify restrictions on speech, even where adults are also affected to some degree. *Denver Area Educ. Tel. Consortium, Inc.*, 518 U.S. at 743; *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-751 (1978).[18] The Massachusetts regulations are appropriately targeted, restricting advertising that children will involuntarily confront as they go to and from school or the park. *See Packer Corp.*, 285 U.S. at 110

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[18] The analysis of tobacco advertising is entirely different than that undertaken in *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Carey*, the Court held invalid a New York law that prohibited all contraceptive advertising, noting that such advertising "state[s] the availability of products and services that are not only entirely legal, but *constitutionally protected*." 431 U.S. 701 (emphasis added, citations omitted). Similarly, in *Bolger* the Court struck down a ban on unsolicited direct-mail advertising of contraceptives because the advertising related to activity "protected from unwarranted state interference" and because unwanted mailings could simply be deposited, unopened, in the trash. 463 U.S. at 69, 72. Tobacco products do not, of course, have the constitutional protection the Court has accorded contraceptives under its privacy cases.

(Justice Brandeis noting, with respect to Utah's restriction of outdoor tobacco advertising, that "[t]he young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce."); *cf. Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127-128 (1989) (holding ban on "dial-a-porn" invalid and contrasting private telephone communications with "public displays . . . which the recipient has no meaningful opportunity to avoid"). As such, the regulations clearly meet *Central Hudson*'s fourth prong requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 00-596

In the Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; AND UNITED STATES TOBACCO COMPANY,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONERS

I. THE PREEMPTION ISSUE WARRANTS THIS COURT'S REVIEW

The Attorney General concedes, as he must, that there is a clear split among the circuits over whether state regulations that effectively ban all public display of cigarette advertising constitute requirements or prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA"). Br. in Opp. 10-11. And he concedes, as he must, that "a number of states and localities" have enacted similar bans. *Id.* at 11. Nonetheless, in an effort to evade this Court's review, the Attorney General tries to minimize the circuit split, to belittle the significance of his own regulations, and to downplay the obvious importance of the question. Br. in Opp. 9-12. These efforts are unavailing.

1. The Attorney General acknowledges that the Ninth Circuit's decision in *Lindsey* is directly contrary to the decisions of the First, Second, and Seventh Circuits on the same question, but he attempts to dismiss *Lindsey* as an "aberration" that gave only cursory attention to 15 U.S.C. § 1334(b). Br. in Opp. 11. That is demonstrably wrong. *Lindsey* was not an unwitting departure from the decisions of the other circuits; on the contrary, the Ninth Circuit explicitly refuted, point-by-point, the erroneous and countertextual construction of the FCLAA adopted by other courts of appeals. *See* Pet. 14-17. Indeed, the end result of the Ninth Circuit's thorough analysis of the statute was an unequivocal repudiation of the holdings of the other circuits:

> Despite the holdings of [the Fourth Circuit in] *Penn Advertising*, [the Seventh Circuit in] *FAIR*, and [the Second

> Circuit in] *Giuliani,* the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion of any cigarettes."

Lindsey, 195 F.3d at 1073.[1] The Ninth Circuit's rejection of the position of other circuits belies the Attorney General's current effort to downplay the conflict.[2]

Subsequent actions of the First and Ninth Circuits demonstrate that the conflict will not be resolved without this Court's intervention. The Ninth Circuit *sua sponte* issued an order requesting the parties to brief the question whether *Lindsey* should be reheard en banc. Following further briefing, the Ninth Circuit declined to grant en banc review. Indeed, shortly before the Ninth Circuit acted, Judge O'Scannlain (a member of the original panel in *Lindsey*) issued a concurring opinion reaffirming his view that it was the Ninth Circuit that had faithfully followed existing Supreme Court precedent. *See* 203 F.3d at 1150. And after the Ninth Circuit decided not to rehear *Lindsey* en banc, the First Circuit explicitly rejected the Ninth Circuit's position and instead aligned itself with the Second and Seventh Circuits. Pet. App. 13a n.7. The result is a

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[1] This disarray among the circuits is exacerbated by the fact that both the First and Second Circuits, in turn, expressly rejected the alternative theory that had been used by the Fourth Circuit to find no preemption in *Penn Advertising*. *See* Pet. 16 n.8.

[2] The Attorney General also suggests (Br. in Opp. 11) that *Lindsey* is distinguishable because the county in that case did not contest the fact that the plain language of the FCLAA warranted preemption. But in *all* of the pertinent cases the courts of appeals explicitly conceded that the plain language of the FCLAA supported preemption; indeed, the entire thrust of the First, Second, and Seventh Circuit's positions is that the pro-preemption argument rests on an "uncritical literalism." Pet. App. 13a n.7.

mature and well-developed circuit split that cries out for this Court's intervention.[3]

2. The Attorney General's attempts to minimize the importance of this circuit conflict are equally unavailing. Remarkably, the Attorney General first belittles the impact of his own regulations, contending that, in light of the restrictions of the Master Settlement Agreement ("MSA"), his regulations are of limited significance. Br. in Opp. 9-10. To the contrary, the significance—and the severity—of the Attorney General's regulations are *magnified* by the fact that they were imposed on top of the already stringent provisions of the MSA: the regulations effectively eliminate all of the remaining outdoor advertising that the MSA permits. *See* Pet. 3-4.

The Attorney General also claims that his regulations are of importance only to the parties before this Court, but that is likewise wrong. The regulations apply to the literally thousands of *retailers* in Massachusetts who wish to engage in tobacco advertising, as well as the advertising businesses that generate such materials. In addition, reversal of the decision below would directly benefit thousands of retailers and advertisers in the scores of other jurisdictions (including New York, Chicago, and Baltimore) where comparable ordinances have been adopted. Indeed, most of the legal challenges that have been brought against these outdoor advertising bans have been filed by retailers and advertising entities. *See, e.g., Lindsey*, 195 F.3d 1065; *Greater N.Y. Metro. Food Council*, 195 F.3d 100; *FAIR*, 189 F.3d 633. Indeed, the burden of the Attorney General's regulations falls more heavily on retailers, most of whom simply cannot afford to buy newspaper or magazine

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[3] The Court's previous denial of certiorari in the Second and Seventh Circuit cases is of no assistance to the Attorney General. *See* Br. in Opp. 11 n.5. In both of those cases, the petitions for certiorari were *interlocutory*. By contrast, review is sought here from a final judgment that disposes of all issues.

advertising. Finally, the Attorney General's opposition overlooks the fact that the preemption issue is of obvious importance to the scores of state and local governments who have enacted, or are considering adopting, similar regulations.

3. The Attorney General's merits-based arguments similarly confirm the need for review. Br. in Opp. 12-18. Notably, the Attorney General could not bring himself to defend the First Circuit's illogical and countertextual holding that restrictions on the display of tobacco advertising "'[do] not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).'" Pet. App. 10a (quoting *Greater N.Y. Metro. Food Council*, 195 F.3d at 109). And, in describing the applicable principles of statutory construction that must guide the interpretation of § 1334(b), *see* Br. in Opp. 13, the Attorney General nowhere mentions the well-settled rule that the *text* of the statute must be the starting point of the analysis. *See Cipollone,* 505 U.S. at 521-22 (plurality); *see also id.* at 532 (Blackmun, J.); *id.* at 548 (Scalia, J.).

Unable to find a basis for the First Circuit's content/location distinction in the text of § 1334(b),[4] the Attorney General instead attempts to ground the distinction in the "structure and purpose of the FCLAA," and, in particular, in the declaration of purpose contained in § 1331. Br. in Opp. 12-15. Because § 1331 states that the FCLAA is intended to prevent a diversity of regulations "with respect to any relationship between smoking and health," the Attorney General contends that the preemption provision in § 1334(b) must be understood as

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[4] The Attorney General suggests that the Massachusetts regulations are not preempted because they are not "based on smoking and health" within the meaning of § 1334(b). This argument, however, was correctly labeled "sophistry" by the Second Circuit, *Greater N.Y. Metro. Food Council,* 195 F.3d at 108, and was likewise rejected by the court below. Pet. App. 13a n.6. It is undisputed (and indisputable) that the *reason* why these regulations single out *tobacco* for special treatment is because the Attorney General believes that tobacco is an unhealthful product.

applying only to local regulations that "require, or prohibit, smoking-and-health information on cigarette packages or with respect to cigarette advertising." Br. in Opp. 14. This argument rests upon a flatly erroneous construction of the FCLAA that was specifically *rejected* in *Cipollone*.

In *Cipollone*, this Court held that § 1334(b)'s preemption language, as amended in 1969, reached both positive enactments and common law rules. 505 U.S. at 521-24; *id.* at 548-49 (Scalia, J.). In reaching this conclusion, the Court relied upon, *inter alia,* the fact that the language of § 1334(b) had been substantially broadened in 1969; whereas the original version of the statute enacted in 1965 extended only to "statements relating to smoking and heaith" required by state regulations, the 1969 version applied to any "requirement or prohibition" imposed under "State law." 505 U.S. at 518, 522. Despite this significant change in the text of § 1334(b), the petitioner in *Cipollone* (like the Attorney General here) sought to rely upon the fact that the declaration of statutory purpose in § 1331 continued to state (as it did in 1965) that the Act was intended to preempt "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*"—language that could be read to exclude common law rules. 505 U.S. at 521 n.19. The Court explicitly rejected this attempt to use the leftover hortatory language of § 1331 to limit the plain language of the amended (and expanded) preemption provision § 1334(b): "Although the 1969 Act did not amend [§ 1331], we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to [§ 1334(b)]." *Id.* This reasoning squarely forecloses the Attorney General's comparable effort to rely upon the unamended, pre-1969 language of § 1331 as a basis for defending the First Circuit's utter disregard of the text of § 1334(b).

II. THE FIRST AMENDMENT ISSUES WARRANT REVIEW

The Attorney General's efforts to evade this Court's review of the uniquely important commercial speech issues raised by this case are equally unavailing.

1. In arguing that review should be denied because "no division of authority" in the lower courts has emerged (Br. in Opp. 19), the Attorney General conspicuously fails to acknowledge why. The First Circuit held that even the most explicit "rumblings" that a Supreme Court decision "may be in need of minor or major modification" do not give a lower court warrant to ignore that precedent. Pet. App. 16a; *cf. Agostini v. Felton*, 521 U.S. 203, 217 (1997). The First Circuit thus concluded that it was *obliged* "to apply the *Central Hudson* test, as is." Pet. App. 16a. It is therefore puzzling to assert, as the Attorney General does, that the Court should wait for a conflict to develop in the lower courts over the applicability of *Central Hudson* in this context. Because the lower courts are not free to disregard *Central Hudson*, the question is one over which no split of authority can ever emerge. Any modification of *Central Hudson* must come from this Court.

2. The Attorney General cannot deny that there is sharp disagreement within this Court concerning the continued vitality and scope of *Central Hudson*. Indeed, he acknowledges that "the Court or individual Justices" have indicated "that certain commercial speech restrictions call for either an exacting application of the *Central Hudson* test or more heightened review." Br. in Opp. 22. That six Justices have questioned *Central Hudson's* continuing vitality during the last decade, including five sitting Justices, alone makes the issue one of surpassing importance. *See* Pet. 19-21 (collecting cases).

Instead, the Attorney General argues that this case presents "the wrong vehicle for reconsideration of the *Central Hudson*

test." Br. in Opp. 20. But as explained in the petition, this case presents an ideal vehicle for clarifying the outer limits of *Central Hudson* precisely because it satisfies any of the conceivable standards for declining to apply the test set forth in that case. Pet. 23-25. Some Justices have suggested that *Central Hudson* applies only to measures that protect consumer choice rather than suppress truthful information due to its content, *see 44 Liquormart,* 517 U.S. at 501 (opinion of Stevens, J.), while others have suggested that the standard should be abandoned altogether, *see, e.g., id.* at 523 (Thomas, J., concurring in the judgment). Under any of these approaches, the Massachusetts regulations could not withstand scrutiny: they are not disclosure requirements designed to prevent misleading advertising; they suppress truthful and nonmisleading speech; and they cannot be justified by concerns about a fair bargaining process. Moreover, the circumstances of this case clearly indicate a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 290. This case is the *ideal* vehicle for reviewing the scope of *Central Hudson*.

The Attorney General's contrary arguments are wholly unpersuasive. He contends that the oft-voiced concern that *Central Hudson* inadequately protects against paternalistic suppression of truthful information, *see, e.g., 44 Liquormart*, 517 U.S. at 501 (plurality); *id.* at 522-23 (Thomas, J.), is not implicated here because the regulations are motivated by paternalistic concerns *about children*. Br. in Opp. 22-23. But, regardless of the Attorney General's claimed subjective motivation, the concern about paternalistic suppression of truthful commercial speech remains fully applicable where, as here, the blunderbuss *means* chosen by the State to protect children involve the wholesale suppression of advertising (aimed at *adults*) in virtually all public areas of the State. The Court has consistently held that speech restrictions cannot "reduce the adult population * * * to reading only what is fit for children." *Bolger*, 463 U.S. at 73 (quoting *Butler*, 352 U.S. at

383); *see also Reno*, 521 U.S. at 875; *Denver Area Educ. Tel. Consortium, Inc.*, 518 U.S. at 759.

The Attorney General also argues that the Court's skepticism regarding *Central Hudson* is limited to "blanket prohibition[s]" on speech, not partial prohibitions on speech. Br. in Opp. 23-24. This contention is both wrong and irrelevant. It is wrong because eight Justices in *Greater New Orleans Broad. Ass'n*, 527 U.S. 173, expressly reserved the question whether *Central Hudson* supplied the proper standard in the context of a law that applied to speech "only when conveyed over certain forms of media," *id.* at 191, and because none of the referenced opinions suggests that suppressions of commercial speech are acceptable if they leave open one limited (and, for many, prohibitively expensive) medium of advertising. *See, e.g., Discovery Network, Inc.*, 507 U.S. at 433-34 & n.1 (Blackmun, J., concurring in the judgment). And it is irrelevant because the commercial speech restrictions at issue here are among the most sweeping ever to confront this Court: if these severe restraints do not raise the same core concerns about "blanket" suppression of speech, then it is hard to imagine what regulations would. The Attorney General quibbles over the geographic breadth of this restraint, but he fails to acknowledge that the First Circuit agreed with petitioners that the practical effect of the regulations was to "prohibit virtually all advertising in as much as ninety percent of the land area of Massachusetts' three largest metropolitan areas," Pet. App. 30a, and to leave many tobacco venders "without *any* reasonable alternative means for communicating with the public," *id.* at 33a (emphasis added). A 90% restriction on speech in the three most populated areas of a State warrants the same First Amendment scrutiny that a 100% restriction receives.

3. As the petition demonstrates, review is also warranted here because the Massachusetts regulations constitute a

viewpoint-based limitation on speech that both implicates core First Amendments concerns and offers a categorical ground for narrowing *Central Hudson*. Pet. 24-25. Yet the Attorney General all but ignores the point, relegating his brief response to a footnote. Br. in Opp. 25 n.17.

The Attorney General asserts that there is "no merit" to the claim that strict scrutiny applies to all "viewpoint-based" limitations on speech, but the only support mustered for this startling proposition is a bootstrap quotation of three sentences from the First Circuit's opinion in this very case. Br. in Opp. 25 n.17. In finding no "danger of viewpoint discrimination," the lower court noted that the regulations apply to all tobacco products, "regardless of brand or manufacturer"; that they "permit nonpromotional speech relating to tobacco products"; and that "[t]he companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions." *Id.* (quoting Pet. App. 15a-16a). But it is hardly reassuring to observe that the regulations have not been applied in a discriminatory manner: who needs to *apply* provisions discriminatorily when the provisions already discriminate *on their face*? And the fact that the regulations prohibit only speech that "promotes" tobacco consumption, *see* 940 C.M.R. 21.03 (Pet. App. 107a), while permitting "nonpromotional" speech that *discourages* tobacco consumption, *see id.* at 14a (allowing "tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns"), is precisely why the regulations *are* viewpoint-based. The First Amendment does not permit the Attorney General to prohibit only those disfavored messages that are inconsistent with the State's self-proclaimed "war against Big Tobacco." JCA 323 (statement of then-Attorney General Harshbarger in support of regulations). The Court has never applied anything less than strict scrutiny to such outright censorship. This feature of the law by itself supports the grant of review.

4. In arguing that the Court's exacting scrutiny of *content-based* regulations does not apply to commercial speech, Br. in Opp. 21-23, the Attorney General makes no attempt to address the contrary case law cited in the petition. *See Discovery Network, Inc.*, 507 U.S. at 428-30 (invalidating as content-based restraints upon commercial speech); *Linmark Assocs., Inc.*, 431 U.S. at 96; *44 Liquormart*, 517 U.S. at 501 (opinion of Stevens, J.). Nor are the authorities cited by the Attorney General of any assistance to him. Far from making this proposition "clear," *Greater New Orleans* expressly *reserved* this question. *See* 527 U.S. at 184. And *R.A.V.* directly contradicts the Attorney General's argument: the cited passage squarely supports the proposition that content-based distinctions, even those concerning unprotected speech, generally receive strict scrutiny. *See id.* at 388-89. If, as *R.A.V.* demonstrates, strict scrutiny applies to content-based distinctions concerning unprotected categories of speech, like fighting words, then surely it must apply to ostensibly greater-protected categories of speech, like commercial speech.[5]

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[5] Even if *Central Hudson* supplies the proper test here, the Attorney General is mistaken in arguing that petitioners are merely criticizing an "incorrect[] appli[cation of] a properly stated rule of law." Br. in Opp. 26. Rather, the problem is the First Circuit's failure to apply several controlling rules of law. Thus, in attempting to defend the tailoring of the regulations on the ground that they are only "incidental[]" to the protection of children, Br. in Opp. 27, the Attorney General overlooks this Court's statement that this interest "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 874, as well as this Court's holding that a speech restraint cannot be justified as incidental without consideration of "the scope of the speech it proscribes." *Greater New Orleans*, 527 U.S. at 194-95. And the Attorney General errs (Br. in Opp. 27 n.18) in attempting to distinguish *Bolger* and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), on the ground that they involved a constitutionally-protected right to privacy. In truth, neither case has been so limited. *See, e.g., Virginia v. Am. Booksellers*, 484 U.S. 383, 389 (1988).

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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IN THE

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Petitioners,

v.

THOMAS F. REILLY, Attorney General
of Massachusetts,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Date: November 16, 2000

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-596

LORILLARD TOBACCO CO., *et al.*,
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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk of the Court. WLF has been unable to obtain the consent of Counsel for Respondent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in Massachusetts. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise, and a limited and accountable government.

WLF devotes a substantial portion of its resources to protecting the right of commercial free speech, appearing before this Court in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C. Cir. 2000). WLF filed an *amicus curiae* brief in this case when it was before the court of appeals.

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* ("FCLAA"). That policy strongly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

WLF fully supports Petitioners' request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize the overriding importance of the First Amendment claims and the need for the Court to clarify the doctrinal foundations supporting government attempts to suppress truthful commercial speech. Because the split among the appeals court regarding the meaning of the FCLAA is so clear, the

Court might give thought to focusing on the FCLAA issue alone and denying review on the First Amendment issue. WLF urges the Court not to follow that course. Rather, WLF urges that review be granted on both issues. This is an especially appropriate case for the Court to re-examine the conflicting strands of commercial speech law that have troubled numerous members of the Court in recent years.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Accordingly, WLF believes that it can bring a perspective on the issues presented that is distinct from that of any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Massachusetts regulations that sharply limit the public display of cigarette advertisements do *not* impose prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts's prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, Petitioners challenge regulations (the "Regulations") promulgated by the State of Massachusetts in January 1999 that virtually eliminate the ability of manufacturers, distributors, and retailers of tobacco products to provide truthful brand and pricing information to lawful adult consumers of tobacco products by means of "outdoor" advertising. *See* 940 CMR §§ 21.00 *et seq.*[2]

The Regulations prohibit maintaining any tobacco advertisement within 1,000 feet of any school, park, or playground. 940 CME § 21.04(5)(a). The prohibited zone covers between 87% and 91% of the land area in the cities of Boston, Worcester, and Springfield. Petition Appendix ("Pet. App.") 79a. The district court determined that the zone "effectively bans nearly all outdoor advertising, and captures nearly all retail establishments in those cities." *Id.* The Regulations apply to *all* outdoor tobacco advertising, without regard to the truthfulness of the advertisement or whether it actually misleads any consumers.

Petitioners filed suit in May 1999 in U.S. District Court for the District of Massachusetts, challenging the Regulations on two principal grounds. First, Petitioners argued that the Regulations were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331

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[2] The definition of "outdoor" advertising includes advertising inside a store that is visible from the outside.

et seq. ("FCLAA"), which imposes strict limits on state regulation of tobacco advertising. Second, Petitioners argued that the Regulations violated the First Amendment right to engage in truthful commercial speech.

On December 2, 1999, the district court held that the Regulations were in large measure *not* preempted by the FCLAA. Pet App. 46a-60a. The court held that the Regulations focused principally on the *location* of tobacco advertisements, and that the FCLAA's preemption provision applies only to state and local laws that seek to regulate the *content* of such ads. *Id.* at 55a-56a. While conceding that the preemption provision of the FCLAA could be interpreted as applying to the Regulations if one's analysis focused on the FCLAA's language (*id.* at 53a), the court rejected that interpretation because it would "leav[e] states essentially powerless" to exercise their "inherent police powers to regulate smoking" -- powers that (the court believed) Congress intended to protect. *Id.* at 54a-55a.

The district court also upheld provisions in the Regulations that outlaw (in the absence of age verification) certain tobacco product promotional techniques, including sampling, promotional give-aways, and offering gifts to tobacco purchasers. The court held that those provisions were not preempted by the FCLAA because they addressed the illegality of underage smoking, not the relationship between smoking and health. *Id.* at 58a-59a.[3]

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[3] The court held that the FCLAA did preempt a provision of the Regulations that permitted "tombstone advertising" -- small signs placed outside retail establishments stating "Tobacco Products Sold Here." 940 CMR § 21.04(6). Pet. App. 57a. The court went on to hold that § 21.04(6) was severable from the remainder of the Regulations and thus

(continued...)

On January 24, 2000, the district court rejected Plaintiffs' First Amendment challenge to the Regulations, granting summary judgment to Massachusetts. Pet. App. 61a-104a. Initially, the court rejected Petitioners' argument that the Regulations should be subject to a heightened standard of review, higher than the standard of review for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *Id.* at 65a-68a. The court held that the Regulations survived the *Central Hudson* test because they directly advanced a substantial government interest (reducing youth smoking) in a manner no more extensive than necessary. *Id.* at 68a-83a. The court held that Massachusetts's evidence was sufficient to establish as a matter of law that "it was reasonable" for the Attorney General to conclude that the goal of reducing youth smoking "would be advanced in some material respect" by restricting tobacco advertising. *Id.* at 74a. The court also held as a matter of law that virtually all of the restrictions on advertising were sufficiently narrowly tailored to pass constitutional muster "[i]n light of the marginal success" of all the state's non-speech-related efforts to control youth smoking. *Id.* at 78a.[4]

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[3](...continued)
that the remaining provisions were fully enforceable. *Id.* The effect of this ruling was to render the Regulations more restrictive of commercial speech than as originally promulgated. Massachusetts did not appeal from this aspect of the district court's ruling.

[4] The court struck down one provision on First Amendment grounds: 940 CMR § 21.04(5)(b), which prohibited indoor, point-of-sale tobacco advertising less than five feet from the floor. The court held that Massachusetts failed to demonstrate that this provision was not more extensive than necessary to serve the state's interest in reducing
(continued...)

On July 17, 2000, the First Circuit affirmed in substantial part. Pet. App. 1a-45a. With respect to FCLAA preemption, the appeals court said that the Regulations involved legislation in a field "traditionally occupied" by the States and thus that it would invoke a strong "presumption against preemption." *Id.* at 7a-9a. In interpreting the FCLAA language it viewed as key -- the preemption of State laws "with respect to the advertising or promotion of any cigarettes" (15 U.S.C. § 1334(b) -- the Court said that the language should not be given a "hyper-literal reading," because otherwise the FCLAA would preempt a broad range of State regulation "which Congress surely did not intend to affect." *Id.* at 10a.

Rather, the court deduced the meaning of § 1334(b) by turning to the FCLAA's statement of purpose, 15 U.S.C. § 1331. The court noted two purposes listed in § 1331: (1) to inform the public of the health risks associated with smoking; and (2) to protect the national economy from the burdens that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards. *Id.* The court determined that the Regulations offended neither of those purposes and thus were not preempted. It held that the Regulations were merely "location" restrictions, not an effort to regulate the content of any tobacco advertising. *Id.* at 12a-13a. It held that to the extent that the Regulations contributed to the nonuniformity of tobacco advertising restrictions nationwide, "such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country. *Id.* at 13a.

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[4](...continued)
youth smoking. *Id.* at 82a.

With respect to the First Amendment claims, the First Circuit rejected Petitioners' argument that -- in light of the near-total prohibition on truthful tobacco advertising based solely on its content[5] -- heightened review (*i.e.*, review beyond that required by *Central Hudson*) was in order. *Id.* at 14a-16a. The court cited *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), for the proposition that heightened review is inappropriate even when regulations single out the promotional speech of a particular industry. *Id.* at 15a. The court acknowledged "rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification"; but it felt "bound to apply the *Central Hudson* test, as is, to this case," because it was not the court's role "to anticipate changes in well-established constitutional doctrines." *Id.* at 16a.

The court then determined that the Regulations passed muster under the *Central Hudson* test. Pet. App. 17a-35a. Because the court was reviewing the grant of summary judgment for Massachusetts, it assumed that the speech at issue was truthful, nonmisleading speech about a lawful activity. The court determined that Massachusetts had a substantial interest in preventing children from smoking (*id.* at 18a), that the Regulations "directly advance" that interest by reducing underage smoking to a material degree (*id.* at 19a-29a), and that the Regulations do not restrict more speech

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[5] The appeals court rejected out of hand Massachusetts's suggestion that the Regulations did not amount to content-based speech restriction. *Id.* at 14a.

than is necessary to achieve the State's purpose. *Id.* at 29a-35a.[6]

REASONS FOR GRANTING THE PETITION

The short-comings of the *Central Hudson* test could not be more starkly illustrated than they are in this case. Applying that test in an apparently good-faith manner, the First Circuit upheld a virtually total ban on outdoor tobacco advertising in the Commonwealth of Massachusetts. The ban was upheld even though: (1) the speech at issue was wholly truthful and non-misleading and concerned a lawful product; (2) there was no evidence that the speech was directed at minors; (3) the court of appeals conceded that the ban was content-based -- the *only* type of speech prohibited is speech that promotes the use or sale of tobacco products; (4) the evidence was equivocal at best regarding whether the Regulations would reduce underage smoking to a material degree; and (5) other methods that do not involve restricting speech could be used to achieve the State's purpose.

Any First Amendment test that could even arguably be applied to uphold sweeping speech restrictions of the type at issue in this case has little to recommend itself. The Court has repeatedly recognized that commercial speech -- while standing somewhat lower in the First Amendment pantheon

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[6] The court reversed the district court's sole First Amendment ruling in support of Petitioners -- the district court's decision to strike down the prohibition against indoor, point-of-sale tobacco advertising less than five feet from the floor. *See* Note 4, *supra.* In upholding the prohibition, the appeals court stated that its earlier *Central Hudson* analysis was equally applicable and that "the fit between ends and means" was "very reasonable." *Id.* at 35a-37a.

than does political speech -- is still entitled to substantial constitutional protection. But the *Central Hudson* test as applied here provides virtually no First Amendment protection; as construed by the First Circuit, *Central Hudson* has become an elastic concept that requires judicial deference to virtually any government commercial speech restriction imposed under the banner of children's welfare.

WLF respectfully submits that the time has come for the Court to reconsider the continued usefulness of the *Central Hudson* test. WLF submits that any test adopted by the Court should evaluate the constitutionality of commercial speech restrictions based on whether they focus on any of the concerns that have led the Court to distinguish between commercial and noncommercial speech. Given the sweeping nature of the speech restrictions upheld in this case in the name of *Central Hudson*, this case provides a particularly appropriate vehicle for the Court to undertake that reconsideration.

WLF fully concurs with Petitioners that review should also be granted on the FCLAA issue. The conflict among the federal appeals courts regarding whether tobacco advertising restrictions of the type imposed by the Regulations are preempted by the FCLAA could not be more stark. But WLF nonetheless believes that the clear cert-worthiness of the FCLAA issue should not be permitted to obscure the importance of the First Amendment issues raised by this case. Any grant of review in this case should include *both* the FCLAA issue and the First Amendment issue.

I. THE COURT SHOULD CLARIFY THE PROPER STANDARD TO APPLY IN CHALLENGES TO BLANKET RESTRICTIONS OF TRUTHFUL, NONMISLEADING COMMERCIAL SPEECH

A. The Court Should Grant Review to Consider Whether, in Practice, the *Central Hudson* Test Provides Sufficient Protection to Truthful Commercial Speech

The importance of advertising in our free-market economy cannot easily be overstated. As the Court has recognized, commercial messages have played "a central role in public life" in this country since colonial times. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 495 (1996) (plurality opinion). In recognition of that role, the courts have held that "the First Amendment protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services." *Id.*

Nonetheless, governments generally have been afforded somewhat more leeway in regulating commercial speech than other forms of speech. That greater leeway has been justified in large part by states' strong interest in protecting consumers from false or misleading information that could result in fraudulent transactions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 & n.24 (1976). States also have an interest in restricting "some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart,* 517 U.S. at 498

(plurality) (citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 366 (1977)).

But where, as here, the commercial speech at issue is neither false nor inherently misleading, nor proposes an illegal transaction, the Court has been extremely reluctant to permit speech restrictions that amount to a ban on wide-ranging categories of commercial speech. As the Court recently observed, "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart,* 517 U.S. at 501 (plurality). Such "complete speech bans" are "particularly dangerous" because "they all but foreclose alternative means of disseminating certain information." *Id.* The Court went so far as to state categorically in one recent case that "*only* false, deceptive or misleading commercial speech may be banned." *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation,* 512 U.S. 136, 142 (1994) (emphasis added).

The Regulations do not, of course, *completely* ban all cigarette advertising within Massachusetts. A Boston store wishing to inform the public that it sells a particular brand of cigarettes is still free to post a sign to that effect somewhere in the 9% of the city in which cigarette advertising is permitted, or to take out a newspaper advertisement. But such advertising is not a realistic alternative for many store owners; a sign posted miles from the store is unlikely to be read by the store's potential customers, and the prohibitive cost of newspaper advertisements places such advertising out of reach of most individual merchants. The Court has stated repeatedly that commercial speech restric-

tions will be subjected to heightened scrutiny even when they do not completely prohibit dissemination of truthful information about a lawful product, if those restrictions fail to leave open satisfactory alternative channels of communications. *See, e.g., 44 Liquormart,* 517 U.S. at 501-02 (plurality) (Rhode Island law prohibiting truthful advertising of liquor prices subjected to heightened scrutiny, even though merchants permitted to display in-store signs listing prices); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92-94 (1977) (ban on "For Sale" signs in front of residential housing failed to provide satisfactory alternative means of informing the public that a particular house was for sale, because "For Sale" signs were the principal means by which such information was traditionally conveyed).

As the Court has made clear, government bans on commercial speech are anathema to the First Amendment when designed not to guard consumers from false or misleading information, but rather as an indirect means of regulating conduct. Such bans are premised on the assumption that the government knows best what is good for consumers and that they are better off if they are denied access to certain information, even though it is not in any way misleading. The Court has labeled such assumptions "offensive" to First Amendment values:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. *Linmark,* 431 U.S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the public perceives to be their own

> good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.

44 Liquormart, 517 U.S. at 503 (plurality); *see also id.* at 517 (Scalia, J., concurring in part); *id.* at 526-27 (Thomas, J., concurring in part); *Virginia State Board of Pharmacy,* 425 U.S. at 762 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented.").

The Regulations could not survive the strict First Amendment review that the Court's recent opinions suggest is required of all laws that impose total or near-total bans on non-misleading commercial speech. The result of the Regulations is to deprive consumers of significant amounts of truthful information. Massachusetts insists, of course, that its purpose is to keep this information away from *minors*, who are prohibited by law from purchasing cigarettes. But the Court has rejected broad commercial speech bans even when their ostensible purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983).

The First Circuit nonetheless rejected Petitioners' First Amendment challenge to the regulations, invoking the *Central Hudson* test. That result suggests the existence of considerably tension between *Central Hudson* and more recent decisions of the Court. Indeed, that tension was acknowledged in *Greater New Orleans* (527 U.S. at 184) and by several of the opinions in *44 Liquormart. See, e.g.,*

44 Liquormart, 517 U.S. at 526-28 (Thomas, J., concurring in part). WLF respectfully suggests that this case provides an appropriate vehicle for reconsidering the *Central Hudson* test.

The essential shortcoming of *Central Hudson* is that it really is no test at all. It permits content-based government regulation of commercial speech where the government has a substantial interest that is directly served by the regulation and where the regulation is no more extensive than necessary to achieve the substantial interest. As applied to speech which the government wishes to keep away from children, *Central Hudson* can be construed (as did the First Circuit) as imposing no constitutional limits whatsoever. Under the First Circuit's view, *any* amount of speech about activities inappropriate for children could induce some amount of that activity among children. Because it is virtually impossible to ensure that *no* children will be exposed to such speech, the effect of the First Circuit's interpretation of *Central Hudson* is to eliminate *all* First Amendment controls over even blanket bans on truthful speech about adult-only activities. Indeed, that is precisely the situation here; despite Massachusetts's insistence that the Regulations are (in some unfathomable way) "carefully tailored" in a manner designed to protect children, the Regulations effectively ban all outdoor advertising of tobacco products.

WLF respectfully suggests that the Court grant review in order to modify the *Central Hudson* test and to clarify that blanket bans on truthful, nonmisleading commercial speech are subject to strict First Amendment scrutiny. Such strict scrutiny would be applied whenever, as here, the purposes underlying the more-relaxed standard of review

often applied to commercial speech (principally, a desire to preserve a fair bargaining process by ensuring that consumers are not misled by inflated sales pitches, *44 Liquormart,* 517 U.S. at 501 (plurality opinion)) are not implicated by the regulation in question.

Review for the purpose of reconsidering the *Central Hudson* test would be highly appropriate not only because of the sweeping nature of the ban on truthful speech in this case but also because the issue was fully briefed and ruled upon by the courts below.

B. The Court Should Grant Review in Order to Correct the First Circuit's Misapplication of *Central Hudson*

The Court should grant review on the First Amendment issue for the additional reason that the First Circuit's decision is inconsistent with *Central Hudson.* The Regulations could not survive scrutiny under the third and fourth prongs of the *Central Hudson* standard.

Under the third and fourth prongs of the *Central Hudson* test, commercial speech that is not false, deceptive, or misleading may be restricted, but only if the government shows that the restriction "directly and materially advances a substantial state interest," and that the restriction advances that interest "in a manner no more extensive than necessary to serve that interest." *Ibanez*, 512 U.S. at 142. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (quoting *Central Hudson*, 447 U.S. at 562).

The third prong ("directly advances") requires the government to prove that its restriction "will in fact"

produce the desired result. A governmental body seeking to sustain a restriction on commercial speech "must demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). "The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.*

The fourth prong ("no more extensive than necessary") requires the government to demonstrate that the restriction is "sufficiently tailored to its goal." *Coors*, 514 U.S. at 491-492. A restriction on commercial free speech is not "sufficiently tailored to its goal" if there exist other means by which the government could pursue its objectives "in a manner less intrusive to First Amendment rights." *Id.* at 491. *See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

The Court has stated time and again that the government bears the burden of justifying its commercial speech restrictions. *See e.g. Coors*, 514 U.S. at 487-88; *Ibanez*, 512 U.S. at 143. The Court has stressed that the government's burden under the *Central Hudson* test "is not satisfied by mere speculation and conjecture." *Edenfield*, 507 U.S. at 770.[7]

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[7] This case cannot be distinguished from other challenges to commercial speech regulations on the ground that the product being advertised is alleged to constitute a vice. The Court in *44 Liquormart* expressly rejected the notion that a "vice" exception exists for First Amendment protection of commercial speech. Justice Stevens explained, "[A] vice label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled

(continued...)

The First Circuit appears to have misapplied the third and fourth prongs of the *Central Hudson* test in concluding that Massachusetts, as a matter of law, had met its burden of persuasion with respect to those issues. With regard to the third prong, it is highly question whether the State can "demonstrate" that its advertising ban "will in fact" serve its asserted objective of promoting the enforcement of state law against selling tobacco to minors "directly and materially." To the contrary, Massachusetts's claim that banning tobacco advertising would decrease unlawful sales to minors is based entirely on "mere speculation and conjecture." No reliable, objective evidence exists to support the claim.[8]

With regard to the fourth prong, there is considerable evidence that the Regulations are not "sufficiently tailored to its goal" because other means exist by which Massachusetts could pursue its goal "in a manner less intrusive to First Amendment rights." Instead of banning tobacco advertising in order to prevent unlawful sales of tobacco to

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[7](...continued)
justification for the regulation of commercial speech about that activity." *44 Liquormart*, 517 U.S. at 514 (plurality); *see also, Rubin v. Coors*, 514 U.S. at 482 n.2. Thus, the district court's conclusion that tobacco *sales* are akin to the sale of pornography (Pet. App. 61a-62a) cannot justify relaxing First Amendment constraints on state regulation of tobacco *advertising*.

[8] In *44 Liquormart*, the Court was willing to accept the "common sense" notions that eliminating price advertising would lead to somewhat higher prices and consequent decreased demand for liquor. But the Court rejected the argument that, in the absence of other evidentiary support, such common sense notions were sufficient for a State to carry its burden of demonstrating that a price advertising ban would "significantly advance" the State's interest in decreased liquor consumption. *44 Liquormart*, 517 U.S. at 505 (plurality).

minors -- which has the effect of preventing the entire adult population from reading such advertising and of prohibiting merchants from effectively marketing their products -- the State could increase efforts to *enforce* the laws prohibiting tobacco sales to minors. Indeed, the First Circuit admitted the existence of such options but nonetheless said that Massachusetts should be permitted to ban speech as an alternative to adopting other options. Pet. App. 32a-33a.

Numerous State and local governments have, like Massachusetts, adopted virtual bans on truthful outdoor tobacco advertising. Review is warranted on the First Amendment issue in order to correct the error below and to provide guidance to courts considering challenges to other such statutes.

II. THE COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICT AMONG THE FEDERAL APPEALS COURT REGARDING THE SCOPE OF FCLAA PREEMPTION

Little need be said, beyond what was already said in the Petition, regarding the urgent need for the Court to resolve the irreconcilable among the federal appellate courts regarding the scope of FCLAA preemption.

The Ninth Circuit has held that the FCLAA preempts State and local government advertising regulations of precisely the sort at issue in this case. *Lindsey v. Tacoma-Pierce County Health Dep't,* 195 F.3d 1065 (9th Cir.1999), *amended,* 205 F.3d 1150 (9th Cir. 2000).[9] Three other

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[9] The municipal defendant in *Lindsey* did not seek Supreme Court (continued...)

federal appeals courts (besides the court below) have arrived at precisely the opposite conclusion. *Greater New York Metropolitan Food Council, Inc. v. Giuliani,* 195 F.3d 100 (2d Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000); *Federation of Advertising Industry Representatives, Inc. v. Chicago,* 189 F.3d 633 (7th Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000); *Penn Advertising of Baltimore, Inc. v. Mayor & City Council,* 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded on other grounds,* 518 U.S. 1030 (1996), *adopted as modified,* 101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204 (1997). Indeed, the First Circuit expressly noted the direct conflict among those four decisions. Pet. App. 9a-13a. The First Circuit adopted the reasoning of the Second and Seventh Circuits and stated explicitly that it disagreed with the Ninth Circuit's holding. *Id.* at 13a n.7.

The need to resolve an inter-circuit split is particularly acute in this case in light of the large number of tobacco advertising prohibitions being adopted (and subsequently challenged) throughout the country. *Id.* at 128a-134a (listing 20 such laws). Moreover, for so long as it remains true that citizens in the nine states comprising the Ninth Circuit have greater rights to engage in truthful commercial speech than do citizens living within the First, Second, Fourth, and Seventh Circuits, the essential purpose of the FCLAA -- to protect the national economy from the burdens that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards -- will be frustrated. 15 U.S.C. § 1331.

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[9](...continued)
review of the Ninth Circuit's decision. Thus, the Court does not have the option of granting review in that case instead of in this one.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari with respect to both of the Questions Presented.

Respectfully submitted,

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Dated: November 16, 2000

(12) (12)

Supreme Court, U.S.
FILED
FEB 22 2001
CLERK

Nos. 00-596 & 00-597

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

I. BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (BOSTON), CASE NO. 99CV11118

1.	5/21/99	Complaint filed. Case assigned to Judge: Young.
2.	6/23/99	Answer by Thomas Reilly in 1:99-cv-11118 to complaint filed.
3.	7/9/99	Consolidated Lead Case. Case is consolidated with 99-11119. 99-11120. 99-11121. All docketing for these cases is to be done in this case.
4.	7/20/99	Motion by Lorillard Tobacco in 1:99-cv-11118. Brown & Williamson in 1:99-cv-11118. R.J. Reynolds Tobacco in 1:99-cv-11118. Philip Morris, Inc. in 1:99-cv-11118 for summary judgment on preemption grounds filed.
5.	7/26/99	Consolidated Lead Case. All docketing for 99-11270 and 99-11135 are to be done in 99-11118.
6.	8/10/99	Unopposed Motion by United States in 1:99-cv-11118 for leave to appear amicus curiae filed.
7.	9/3/99	Amicus Curiae brief by United States in 1:99-cv-11118 filed.
8.	9/15/99	Motion Hearing held.

9.	10/15/99	Motion by Thomas Reilly in 1:99-cv-11118 for partial summary judgment on first amendment claims filed.
10.	10/29/99	Cross motion by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 for partial summary judgment on first amendment claims filed.
11.	11/10/99	Motion by Thomas Reilly in 1:99-cv-11118 for partial summary judgment (Cigar Warnings) filed.
12.	11/10/99	Motion by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118, John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 for partial summary judgment filed.

13.	12/2/99	Chief Judge William G. Young. Memorandum and Order entered. The Court therefore GRANTS IN PART the Tobacco Companies' motion for summary judgment by declaring 940 C.M.R. 21.06 preempted under the Act. With respect to the remaining portions of the challenged Regulations, however, the Court holds that they are not pre-empted and thus GRANTS IN PART the Attorney General's cross-motion for summary judgment. These rulings address the narrow issue of federal pre-emption. The Court, in making these rulings, intends no intimation whatsoever concerning the First Amendment issues presented in this case. See Document #106 for complete Memorandum and Order.
14.	12/2/99	Motion hearing re: motion for partial summary judgment, motion for partial summary judgment (Cigar Warnings), cross motion for partial summary judgment on first amendment claims, and motion for partial summary judgment on first amendment claims. Motion hearing held.

15.	12/2/99	Chief Judge William G. Young. Clerk's Notes: re: Motion hearing held. After hearing the motion for partial summary judgment on first amendment claims taken under advisement cross motion for partial summary judgment on first amendment claims taken under advisement motion for partial summary judgment (Cigar Warnings) taken under advisement motion for partial summary judgment taken under advisement. Court rules with agreement of parties that a trial is not necessary. The decision of the Court based on the pleadings on file will issue by 2/1/00. Final Pretrial set for 12/8/99 is cancelled Court Reporter: D. Womack.
16.	1/7/00	Motion by Lorillard Tobacco in 1:99-cv-11118. Brown & Williamson in 1:99-cv-11118. R.J. Reynolds Tobacco in 1:99-cv-11118. Philip Morris, Inc. in 1:99-cv-11118. U.S. Tobacco Co. in 1:99-cv-11118. Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 for permanent injunction filed.

17.	1/13/00	Motion by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 to stay this action pending appeal or alternatively injunction pending decision on pltfs' summary judgment motions filed.
18.	1/14/00	Motion by Lorillard Tobacco in 1:99-cv-11118 for injunctive relief filed.
19.	1/24/00	Chief Judge William G. Young. Memorandum and Order entered, granting in part, denying in part motion for partial summary judgment on first amendment claims granting in part, denying in part cross motion for partial summary judgment on first amendment claims granting in part, denying in part motion for partial summary judgment (Cigar Warnings) granting in part, denying in part motion for partial summary judgment. See Document #123 for further details.

20.	1/25/00	Chief Judge William G. Young. Judgment entered. "This Court enters judgment declaring that both Mass. Regs. Code tit. 940, 21.00-27.07 and Mass. Regs. Code tit. 940, 22.00-22.09, as construed by this Court's Memorandum and Order dated 1/24/00, are valid exercises of the authority of the Attorney General with the sole exceptions of the parameters of the point-of-sale Tobacco Regulations. 940 C.M.R. 21.05(5)(b), as amended through 1/10/00, and the cognate Cigar Regulations. 940 A.M.R. 22.06(5)(b), as amended through 1/19/00. See Document #124 for further details.
21.	1/25/00	Case closed.
22.	1/25/00	Chief Judge William G. Young. Endorsed Order entered denying motion to stay this action pending appeal alternatively injunction pending decision on pltfs' summary judgment motions.
23.	1/26/00	Notice of appeal by U.S. Tobacco Co. in 1:99-cv-11118 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 19821 Appeal record due on 2/25/00.

24.	1/26/00	Notice of appeal by Lorillard Tobacco in 1:99-cv-11118. Brown & Williamson in 1:99-cv-11118. R.J. Reynolds Tobacco in 1:99-cv-11118. Philip Morris, Inc. in 1:99-cv-11118 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 19813 Appeal record due on 2/25/00.
25.	1/27/00	Notice of appeal by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 19835 Appeal record due on 2/26/00.
26.	1/28/00	Chief Judge William G. Young. Endorsed Order entered denying motion for permanent injunction.
27.	1/28/00	Chief Judge William G. Young. Endorsed Order entered denying motion for injunctive relief.
28.	2/2/00	Order of the US Court of Appeals re: appeals, the motions for stay pending appeal are allowed. See order for more details.
29.	2/16/00	Notice of cross-appeal by Thomas Reilly in 1:99-cv-11118. filed. Fee Status: unk.

II. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, CASE NO. 00-1107

1.	1/28/00	Civil Case docketed. Opening forms sent. Notice filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Internation, Appellant Tobacco Exporters, Appellant Swedish Match N.A. Docketing Statement due 2/11/00. Record due 2/7/00. Transcript Report/Order due 2/7/00.
2.	1/28/00	Record filed: 5 volume(s).
3.	1/28/00	Motion filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Internation, Appellant Tobacco Exporters, Appellant Swedish Match N.A. for stay pending appeal. Certificate of service dated 1/27/00.
4.	1/29/00	Response in opposition filed by Appellee Thomas Reilly in 00-1107 to appellants' motion for injunction. Certificate of service date 1/29/00.
5.	1/31/00	Order filed by Judge Bruce M. Selya and Judge Kermit V. Lipez. The motions for stay pending appeal are

allowed. Pending further order of this court, the following sections of Title 940 of the Code of Massachusetts Regulations shall be stayed: § 21.04(1)(a), (c) & (d); § 21.04(2)(c) & (d); § 21.04(5); § 21.04(6); § 22.04; § 22.05; § 22.06(1)(a), (c) & (d); § 22.06(2)(c) & (d); § 22.06(5); § 22.06(6). The appeals shall be consolidated for purposes of briefing and oral argument, and the following expedited briefing schedule shall be observed. Appellants' briefs shall be filed by Friday, February 18, 2000; appellee's brief(s) shall be filed by Friday, March 10, 2000; and any reply brief(s) shall be filed by Thursday, March 16, 2000. In anticipation of holding oral argument in the April 2000 sitting, briefing extensions will not be granted absent extraordinary circumstances.

6. 2/18/00 Brief filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Intl, Appellant Tobacco Exporters, Appellant Swedish Match N.A. in 00-1107, 1117, 1118, 1270-1275. Pages: 51, Copies: 10 delivered by hand. Certificate of service date 2/18/00.

7.	2/25/00	Party Amicus Curiae Association of National Advertisers in 00-1107, Amicus Curiae Association Of National Advertisers in 00-1117 added to case.
8.	2/25/00	Brief filed by Amicus Curiae Assoc of Natl Adv. in 00-1107, Amicus Curiae Assoc of Natl Adv. in 00-1117 in support of appellants. Pages: 29, Copies: 10, delivered by mail. Certificate of service date 2/24/00.
9.	3/10/00	Brief filed by Appellee/Cross-Appellant Thomas Reilly in 00-1107, 00-1270 through 00-1275. Pages: 58, Copies 9: delivered by hand. Certificate of service date 3/10/00.
10.	3/22/00	Reply Brief filed by Consolidated Cigar, General Cigar Co., Havatampa, Inc., John Middleton, Inc., L.J. Peretti Co. Inc., Swisher Intl, Tobacco Exporters, Swedish Match N.A. in 00-1107 and 00-1270 through 00-1275. Pages 29, Copies 9, delivered by hand. Certificate of service date 3/22/00.
11.	4/6/00	Public Note: [00-1107, 00-1117, 00-1118, 00-1270, 00-1271, 00-1272, 00-1273, 00-1274, 00-1275] The Attorney General's office has informed this office that they will not be filing a final responsive brief.
12.	4/7/00	Case Argued 04/07/00. Torruella, Ch. J., Bownes, Lipez, JJ.

13.	4/26/00	Order filed by Chief Judge Juan R. Torruella, Judge Hugh H. Bownes, Judge Kermit V. Lipez. The State of Washington's motion for reconsideration of our order denying it and other states leave to file an amici brief is denied. Although we value the input of the various States, accepting their brief in this case would create a recusal issue for one of the judges on the panel. In keeping with circuit policy, we will not accept an amici brief under these circumstances. So Ordered. in 00-1117, 00-1118.
14.	7/6/00	Letter filed by Attorney General's Office regarding agreements containing consent orders from certain cigar manufacturers, importers or marketers.
15.	7/17/00	Opinion filed. Chief Judge Torruella, Judges Bownes, Lipez. Chief Judge Juan R. Torruella, Authoring Judge. Published.
16.	7/17/00	Judgment filed by Chief Judge Torruella, Judges Bownes, Lipez closing case. The judgment of the district court is affirmed in part and reversed in part in accordance with the opinion issued this day.

17.	8/3/00	Motion filed by Lorillard Tobacco, Brown & Williamson, R.J. Reynolds Tobacco, Philip Morris Inc. to stay mandate pending writ of certiorari. [500282-1] Certificate of service dated 8/2/00.
18.	8/7/00	Motion filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Intl, Appellant Tobacco Exporters, Appellant Swedish Match N.A. to stay mandate until petition for writ of certiorari. [500297-1] Certificate of service dated 8/4/00.
19.	8/14/00	Order filed by Chief Judge Juan R. Torruella, Judge Kermit V. Lipez granting appellants' motions to stay mandate pending writ of certiorari.
20.	8/15/00	Response filed by Appellee Thomas Reilly to motion to stay mandate. Certificate of service dated 8/14/00.
21.	8/16/00	Motion filed by Appellee Thomas Reilly to reconsider order dated 8/14/00 staying the issuance of mandate. Certificate of service dated 8/16/00.

22.	8/31/00	Order filed by Chief Judge Juan R. Torruella, Judge Hugh H. Bownes, Judge Kermit V. Lipez. (00-1107, 1117, 1118) It is ordered that appellee's motion for reconsideration is granted, and the appellee's opposition having been considered, It is further ordered that appellants' motions to stay the mandate pending a petition for writ of certiorari are allowed in 00-1118.
23.	10/20/00	U.S. Supreme Court Notice filed regarding petition for writ of certiorari. Filed in the Supreme Court on [509001-1] 10/16/00. Supreme Court case number: 00-596.
24.	10/23/00	U.S. Supreme Court Notice filed regarding petition for writ of certiorari. Filed in the Supreme Court on [509294-1] 10/16/00. Supreme Court case number: 00-597.
25.	1/11/01	U.S. Supreme Court Order granting petition for writ of certiorari in 00-1107, granting petition for writ of certiorari in 00-1117, 00-1107, 00-1118, 00-1270, 00-1271, 00-1272, 00-1273, 00-1274, 00-1275 filed in the Supreme Court on 1/8/01. The motion of Washington Legal Foundation for leave to file a brief as amicus curiae is granted also.

[Filed: May 21, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHILIP MORRIS
INCORPORATED,

Plaintiff,

CIVIL ACTION
NO. _____

v.

THOMAS REILLY,
Attorney General of the
Commonwealth of
Massachusetts,

Defendant.

COMPLAINT

* * * *

2. ...Although the stated goal of the Challenged Regulations is to reduce the incidence of underage tobacco use, the purpose and effect of advertising brands of cigarettes is not to persuade non-smokers to begin to smoke, but rather to alter or reinforce the brand preferences of smokers.

* * * *

15. On-site advertising of tobacco products also constitutes an important means by which convenience stores, gas stations and other retail stores that sell tobacco products generate sales, not only of tobacco products but also of other items on sale. To stimulate traffic in such stores, it is important to communicate to adult smokers that they can purchase

popular brands of cigarettes inside the store. Advertisements for tobacco products often trigger the kind of spontaneous purchase decisions that get customers inside the store.

* * * *

Respectfully submitted,

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[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated May 26, 1999]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES TOBACCO COMPANY,	)	
Plaintiff,	)	Civil Action No. 99CV11135WGY
v.	)	
THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. This is an action to declare null and void, and to enjoin enforcement of, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) (the "Advertising and Marketing Regulations" or the "Regulations" attached as Exhibit A hereto) promulgated by the Attorney General of the Commonwealth of Massachusetts purportedly under Mass. Gen. Laws ch. 93A, § 2(c). The Advertising and Marketing Regulations (1) prohibit constitutionally protected advertising and promotion practices by manufacturers of smokeless tobacco products, in part, by categorically denominating such lawful activities as purportedly "unfair or deceptive" acts or practices, and (2) unconstitutionally restrict protected retail practices regarding the lawful promotion of smokeless tobacco products to adults.

Advertising Restrictions

2. The Advertising and Marketing Regulations would ban the following means of lawful advertising of smokeless tobacco products without regard to whether any particular advertisement is "unfair or deceptive":

(a) Outdoor advertising, including advertising in enclosed stadiums and advertising within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school. § 21.04(5)(a); and

(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a one thousand foot radius of any public play-ground, playground area in a public park, elementary school or secondary school. § 21.04(5)(b).

3. The following sign, however, is permitted:

(a) A retailer may place one sign no larger than 576 square inches and containing only black text on a white background stating "Tobacco Products Sold Here" on the outside or visible from the outside of each location where such products are offered for sale. § 21.04(6).

Promotional Restrictions

4. The Advertising and Marketing Regulations would ban the following retail practices, among others:

(a) Sampling, promotional giveaways, or any other free distribution of cigarettes or smokeless tobacco products. § 21.04(1)(a);

(b) Sale or distribution of cigarettes or smokeless tobacco products if any gift or item other than cigarettes or smokeless tobacco is offered in consideration of the purchase. § 21.04(1)(d).

Retail Outlet Sales Restrictions

5. The Advertising and Marketing Regulations would ban the following retail outlet sales practices, among others:

(a) Selling cigarettes or smokeless tobacco products in any manner other than in a direct, face-to-face exchange without the assistance of any vending machines or any other electronic or mechanical device. § 21.04(2)(a);

(b) Using self-service displays of cigarettes or smokeless tobacco products. § 21.04(2)(c); and

(c) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel. § 21.04(2)(d).

Nature of Claims

6. The Advertising and Marketing Regulations promulgated by the Attorney General violate the First and Fourteenth Amendments of the United States Constitution by abridging plaintiff's right to free commercial speech. By purporting to directly regulate interstate commerce outside of Massachusetts, the Advertising and Marketing Regulations also violate the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution. Moreover, as applied to adult-only establishments, certain Regulations are irrational in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Parties

7. United States Tobacco Company ("USTC") is a Delaware corporation with its principal place of business in Connecticut. Through United States Tobacco Manufacturing

Limited Partnership, USTC manufactures brands of smokeless tobacco products in states other than Massachusetts that are sold throughout the United States, including Massachusetts, and in other countries. Through its subsidiary, United States Tobacco Sales and Marketing Company Inc., USTC engages in advertising and marketing activities within the Commonwealth designed to promote sales of its smokeless tobacco products to adults.

8. Thomas F. Reilly is the Attorney General of the Commonwealth of Massachusetts. The former Attorney General promulgated the Advertising and Marketing Regulations purportedly pursuant to the authority granted to the Attorney General under Mass. Gen. Laws ch. 93A, § 2(c).

Jurisdiction and Venue

9. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331, 1343. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65.

10. Venue is proper in the district pursuant to 28 U.S.C. § 1391(b).

Facts Applicable to All Counts

11. USTC employs various methods of advertising and promoting its products in Massachusetts, including certain advertising, self-service displays and the placement of promotional materials in retail stores. USTC's marketing activities also include offering samples and promotional give-aways in adult-only facilities.

12. The Advertising and Marketing Regulations are an unconstitutional encroachment on plaintiff's ability to lawfully advertise and promote its smokeless tobacco products to adults. The requirements of the Regulations establish an actual and justiciable controversy between plaintiff and defendant as

to whether the Regulations violate the United States Constitution.

13. Compliance with the terms of the Regulations would cause plaintiff irreparable injury, including the abridgement of plaintiff's constitutional right to free commercial speech.

14. The Attorney General's Advertising and Marketing Regulations would prohibit the plaintiff from lawfully engaging in constitutionally protected advertising and promotional activities in violation of the First and Fourteenth Amendments to the United States Constitution. The practical effect of the Regulations is virtually to ban the lawful advertising of smokeless tobacco products in Massachusetts (except in the most rural areas) under the guise of preventing deceptive or unfair trade practices.

15. The Advertising and Marketing Regulations violate the First Amendment of the Constitution by abridging plaintiff's right to free commercial speech. Advertising directed toward the lawful promotion of a legal product cannot unilaterally be prohibited by the Attorney General because advertising that does not directly incite illicit activity is protected commercial speech. The Attorney General's asserted interest in curbing purportedly deceptive or unfair advertising is not substantial enough to justify banning lawful smokeless tobacco advertising directed at adults. Nor do the Regulations materially advance the asserted goal. The Regulations are also not sufficiently narrowly tailored to ensure that they are no more extensive than necessary to advance the interests asserted by the Attorney General. Moreover, the only exception to the Attorney General's blanket rule is for a sign no larger than four square feet "containing only black text on a white background stating 'Tobacco Products Sold Here.'" That paltry exception is plainly insufficient to cure the constitutional deficiencies of the Regulations.

16. Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) of the Regulations would, in effect, ban constitutionally protected advertising and marketing practices in the Commonwealth. The Attorney General cannot constitutionally impose such a pervasive prohibition where truthful, nonmisleading advertising will be abridged along with allegedly deceptive or unfair commercial speech. The protected speech contained within the plaintiff's advertising relates to an activity that is lawful for adults. The Attorney General cannot by unilateral action prohibit constitutionally protected advertising and promotional practices where less restrictive means are available to adequately achieve his purported goals. Because the Regulations are unjustifiably more extensive than necessary to serve the interests they ostensibly were designed to protect, and if enforced would impose unwarranted economic harm to the plaintiff engaged in the lawful activity of selling smokeless tobacco products to adults, they are unconstitutional under the First Amendment.

17. The plaintiff's brands of smokeless tobacco products, which are manufactured in other states, have been distributed in interstate commerce for many years continuously to the present. Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), and (2)(d) of the Regulations prohibit (i) the distribution of free samples; (ii) the distribution of non-tobacco gifts; (iii) selling smokeless products in any manner other than a direct face-to-face exchange; (iv) using self-service displays of smokeless tobacco products; and (v) failing to place smokeless tobacco products out of the reach of all customers, and in a location accessible only to outlet personnel. These Regulations are not limited on their face to Massachusetts. Since these restrictions are not limited to activities occurring in Massachusetts, they purport to directly regulate interstate commerce in violation of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution.

18. Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d), which (i) ban sampling and other free distribution, (ii) ban gift items in consideration of the purchase of smokeless tobacco products, (iii) permit only direct face-to-face sales, (iv) ban self-service displays, and (v) require that smokeless tobacco products be kept out of the reach of consumers, are irrational as applied to adult-only establishments. The lack of nexus between these sections and their asserted goal is further exacerbated by an internal inconsistency within the Regulations: the point-of-sale restriction expressly limits that provision to "retail establishment(s) accessible to persons younger than 18 years old." § 21.04(5)(b). Unlike section 21.04(5)(b), sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d) are not limited to establishments only accessible to minors. As applied to adult-only establishments, they are not even rationally related to the Attorney General's asserted purpose, and therefore violate the Equal Protection Clause of the Fourteenth Amendment.

19. The Attorney General is a person within the meaning of 42 U.S.C. § 1983 because plaintiff seeks to enjoin him from taking actions in his official capacity. In promulgating the Advertising and Marketing Regulations, ostensibly pursuant to the statutory authority of Mass. Gen. Laws ch. 93A, § 2, the Attorney General acted under color of state law. Enforcement of the Regulations would deprive plaintiff of its rights protected by federal law.

CLAIMS FOR RELIEF

Count I (First Amendment - Free Speech)

20. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 19 of this Complaint as though fully set forth herein.

21. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d) 21.04(5) and 21.04(6) are null and void under the First and Fourteenth

Amendments to the United States Constitution in that they abridge plaintiff's right to free commercial speech.

22. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count II (Commerce Clause)

23. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 22 of this Complaint as though fully set forth herein.

24. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d) are null and void under Article I, Section 8, Clause 3 of the United States Constitution ("Commerce Clause") in that they purport to directly regulate interstate commerce in smokeless tobacco products.

25. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count III (Equal Protection)

26. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 25 of this Complaint as though fully set forth herein.

27. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d), are null and void under the Equal Protection Clause of the Fourteenth Amendment to the Constitution in that they do not rationally relate to the Attorney General's asserted goal as applied to adult-only establishments.

28. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count IV (42 U.S.C. § 1983)

29. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 28 of this Complaint as though fully set forth herein.

30. Defendant is a person who has acted under color of state law to unlawfully and substantially deprive plaintiff of rights secured by the United States Constitution by promulgating and threatening to enforce the Advertising and Marketing Regulations.

31. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count V (Supremacy Clause)

32. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 31 of this Complaint as though fully set forth herein.

33. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) are null and void under the Supremacy Clause, Article VI, Clause 2 of the Constitution, in light of the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-4408, and/or the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340.

34. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful

advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

a. enter a judgment declaring 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) null and void;

b. enter preliminary and permanent injunctive relief enjoining defendants and their agents from taking any action under or to enforce any provision of 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6);

c. award plaintiff its reasonable attorneys' fees and costs; and

d. grant plaintiff such additional or different relief as this Court deems just and proper.

Date: May 26, 1999
Boston, Massachusetts

Respectfully submitted,

/s/ George J. Skelly

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[Dated June 10, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BROWN & WILLIAMSON TOBACCO CORPORATION,	)	
Plaintiff(s),	)	Civil Action No. 99-11121 WGY
v.	)	
THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,	)	
Defendant(s).	)	

AMENDED COMPLAINT

Introduction

1. This is an action to declare null and void, and to enjoin enforcement 940 C.M.R. §§ 21.04(l)(a), (1)(c), (1)(d), 21.04(2)(c), (2)(d), 21.04(5) and 21.04(6) (the "Challenged Regulations"), promulgated by Defendant, the Attorney General of the Commonwealth of Massachusetts. The Challenged Regulations impose unconstitutional restrictions on the ability of the Brown & Williamson Tobacco Corporation ("Brown & Williamson") to advertise and promote its products in the Commonwealth of Massachusetts.

2. Although the stated goal of the Challenged Regulations is to reduce the incidence of underage tobacco use, Defendant has not demonstrated and cannot demonstrate, as the First Amendment requires, that the Challenged Regulations will have the intended effect of, or are necessary to achieve, the stated

goal. It is clear, however, that the Challenged Regulations *will* limit severely Plaintiff's ability to communicate with adults about the products they sell as part of their legitimate competition for the adult consumer market. The restrictions are doubly onerous because Plaintiff's speech already is limited in other ways. The Commonwealth has ample alternative means available to it—including requirements and prohibitions set forth in state statutes and in other regulations promulgated by Defendant that have not been challenged in this action—to address minors' access to tobacco products and the incidence of underage tobacco use while imposing a significantly lesser burden on Plaintiff's ability to communicate with adult consumers concerning tobacco products. Moreover, the Challenged Regulations operate categorically, deeming all covered activities as "unfair or deceptive" under Mass. Gen. Laws c.93A without regard to whether any particular advertisement or promotion is "unfair or deceptive" or otherwise proscribable. As a result, the Challenged Regulations violate Brown & Williamson's right to freedom of speech secured by the First and Fourteenth Amendments of the United States Constitution.

3. Sections 21.04(1)(a), (1)(c), (l)(d), 21.04(5), and 21.04(6) of the Challenged Regulations also violate the Supremacy Clause of the U.S. Constitution by imposing requirements and prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes that are labeled in accordance with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* Under 15 U.S.C. § 1334(b), these Challenged Regulations are expressly preempted.

4. In addition, certain of the Challenged Regulations ban various retail sales practices and forms of communication in all retail outlets. These practices and communications are even banned in those outlets that are not accessible to individuals under the age of 18 years, despite the rules' alleged purpose

"to address the incidence of cigarette smoking ... by children under legal age," and notwithstanding the fact that such venues are exempted from other provisions of the Challenged Regulations. To the extent that these portions of the Challenged Rules apply even in stores and other venues that are not accessible to individuals under 18, the Challenged Rules are not rationally related to their declared purpose, do not rationally further any legitimate state interest in preventing "unfair or deceptive" acts or practices, and therefore also violate the Equal Protection and Due Process provisions of the Fourteenth Amendment of the United States Constitution, as well as the tailoring requirement of the First and Fourteenth Amendments.

5. To the extent that such regulations purport to prohibit transactions between persons outside of Massachusetts or that otherwise lack a sufficient nexus to Massachusetts, the Challenged Regulations constitute impermissible extraterritorial regulation in violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

6. The implementation of the Challenged Regulations will give rise to irreparable global harm to Brown & Williamson, which faces the denial of its free speech and due process rights and the severe restriction of its ability to compete for retail sales with its competitors, with consequent lost sales the magnitude of which could not adequately be determined. Implementation of the Challenged Regulations will also give rise to irreparable harm to adult consumers of tobacco products, who will be denied lawful communications regarding products they may wish to purchase.

7. The Challenged Regulations are unconstitutional and invalid. They should be preliminarily and permanently enjoined.

Parties

8. Brown & Williamson Tobacco Corporation is a Delaware corporation with its principal place of business in Kentucky. Brown & Williamson manufacturers cigarettes and smokeless tobacco products that are advertised, marketed and sold throughout the United States, including Massachusetts.

9. The defendant, Thomas F. Reilly, is the Attorney General of the Commonwealth of Massachusetts. Defendant's predecessor promulgated the Challenged Regulations, purportedly pursuant to power granted to the Attorney General under Mass. Gen. Laws c.93A, § 2(c).

Jurisdiction and Venue

10. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 & 1343. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-02 and Fed. R. Civ. Proc. 57 and 65.

11. Venue is proper in the district pursuant to 28 U.S.C. § 1391(b).

Facts Applicable to All Claims

12. Brown & Williamson is a non-Massachusetts corporation that manufactures cigarettes and smokeless tobacco products that are marketed and sold in Massachusetts. Brown & Williamson engages in advertising and promotional activities that are intended to promote sales of its brands to adult smokers. Historically, Brown & Williamson—like manufacturers of other consumer products—has employed a broad range of methods to advertise and promote its products, including print and broadcast advertising, billboards, coupons, various forms of price offers (e.g. "two for one" or "cents off" promotions), brand sponsorship of athletic and cultural events, and placement of posters, decals, self-service displays and other promotional materials at or inside retail stores. Typically, these retail store promotions are pursuant to arrangements that

involve financial incentives offered by Brown & Williamson (or by other manufacturers) to retailers in exchange for the display, at points of sale, of such materials.

13. In recent years, however, Brown and Williamson's speech has been progressively curtailed by law. Brown & Williamson has not advertised cigarettes on radio and television since Congress enacted 15 U.S.C. § 1335, a statute Brown & Williamson has never challenged.

14. In November 1998, Brown & Williamson (and other tobacco companies), faced with lawsuits from various states seeking billions of dollars, entered into an agreement with the Attorneys General of 46 states, including Massachusetts, that resulted in further restrictions on the promotion and advertising of cigarettes (the "Agreement"). The terms of the Agreement required that Brown & Williamson, among other things, discontinue altogether most forms of outdoor or publicly visible cigarette advertising, including such advertising on billboards. This prohibition, like many others-in the Agreement, is incorporated into a judicially enforceable Consent Decree.

15. The Agreement allows many forms of advertising displayed on the property of retail establishments, whether such advertising is located indoors or outside. Such on-site brand advertising (which is subject to a size limitation and other restrictions under the Agreement) constitutes one of the few remaining means for Brown & Williamson to communicate with adult smokers. The retail store environment is the primary place where consumers develop awareness of advertising and brand differences among competing cigarette products. That awareness is developed through the use of signage both inside and outside of the store and through the use of various product displays. Such advertising serves to supply consumers with pertinent information such as price and other brand attributes, to foster brand loyalty and to encourage smokers of other brands to try or switch to the advertised brands.

16. On-site advertising of tobacco products also constitutes an important means by which convenience stores, gas stations, and other small retail stores that sell tobacco products generate sales, not only of tobacco products but also of other items on sale. To stimulate traffic in such stores, it is important to communicate to adult consumers that they can purchase popular brands of cigarettes inside the store. Outdoor advertisements for tobacco products often trigger the kind of spontaneous purchase decisions that get customers inside the store. Once inside, these customers tend to make purchases of other products in addition to tobacco.

17. Self-service displays of cigarettes provide price and other brand information that is crucial to the consumers' choice between products. Importantly, they provide such information at a time and in a manner that the consumer can directly examine the product, review its label, and make an immediate purchase decision.

18. Controlled-service displays are not adequate substitute for self-service displays. Controlled-service inhibits direct access to and comparison of products. They also separate perception of the message from the point-of-purchase decision. As a practical matter, controlled-service displays in most retail establishments must be immediately accessible to the cashier. In many establishments, such accessible space is extremely limited, many products compete for that space, and it contains a clutter of messages that interferes with effective communication about any given product. The limited space available is often devoted primarily or exclusively to brands with a significant market share, frequently in accordance with contracts between the retailer and competing manufacturers. The restrictions in the Challenged Regulations on advertising tobacco products at levels below five feet further restrict the available avenues of communication, and increase the potential that such limited areas will be dominated by the most popular brands that can offer the best deals to retailers. Self-service

display are therefore vital in order to communicate with consumers regarding new brands and promotions or brands that appeal to a smaller share of the market. Because Brown & Williamson manufactures a wide variety or brand styles that do not tend to dominate a particular market, Brown & Williamson is particularly impacted by the ban on this means of communication. Other means of communication about tobacco products are sharply limited by other laws and, in any event, are not adequate.

19. On January 22, 1999, Defendant promulgated regulations severely limiting the advertising and promotion of cigarettes and smokeless tobacco products, including the Challenged Regulations, purportedly pursuant to the Attorney General's rule-making powers under Mass. Gen. Laws. c.93A, § 2(c). (A copy of these regulations is attached to this Complaint as Attachment A.) Sections 21.04(2)(c) and (2)(d) ban all self-service displays of tobacco products in all retail outlets, regardless of whether minors have physical or visual access to them. Sections 21.04(5) and (6) of the Challenged Regulations prohibit virtually all on-site outdoor advertising of tobacco products and any indoor advertising "directed toward" or "visible from" the outside of any retail establishment that is located within 1000 feet of any "public playground or playground area in a public park, elementary school, or secondary school." Within such establishments, no cigarette advertising is permitted to be displayed less than five feet from the floor if the establishment is accessible to minors. The only publicly visible advertising that is permitted is a sign no larger than four square feet "containing only black text on a white background stated 'Tobacco Products Sold Here'."

20. The effect of those prohibitions, individually and cumulatively, will be to ban most on-site advertising and promotion of tobacco products in Massachusetts, except in the most rural areas. The Challenged Regulations will virtually eliminate the already-limited space available for communication

with adult customers at the primary venue for such communication - Massachusetts retailers legally selling tobacco products to adult customers.

21. In addition to its on-site advertising practices, Brown & Williamson has implemented various marketing and promotional programs intended to enhance the loyalty of adult smokers to particular brands. These programs play a significant role in the efforts of Brown & Williamson to compete with other manufacturers of cigarettes for market share. These programs can involve (subject to the limitations set forth in the Agreement) such common consumer marketing practices as the distribution of tobacco products by mail in redemption of coupons or proofs of purchase, distribution of product samples in adult-only establishments, distribution of promotional items attached to packs of cigarettes, and the offering of non-tobacco merchandise to adult customers who submit specified proofs of purchase. These programs typically operate nationwide and are not limited, or directed principally, to Massachusetts consumers.

22. Sections 21.04(1)(a), (c) and (d) of the Challenged Regulations would severely limit these programs by prohibiting any manufacturer of any cigarettes sold in the Commonwealth from engaging in a variety of promotional activities, including promotional give-aways, distribution of cigarettes through the mail, and distribution of tobacco products if any gift or item other than cigarettes or smokeless tobacco is offered in consideration of the purchase. These prohibitions on their face are not limited to promotional activities occurring in Massachusetts or involving Massachusetts consumers. Rather, they purport to restrict such activities by the Plaintiff anywhere.

23. The stated purpose of the Challenged Regulations is to restrict the advertising of tobacco products "in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." Brown & Williamson does not market its products to minors. It limits

participation in promotional programs to adult smokers and it has initiated and supported efforts to discourage underage smoking and sales to minors. In a well-established, mature product market, such as the market for tobacco products, the principal function of advertising and promotion is to either reinforce or change the brand preferences of those who have already made the decision to use the product. Accordingly, the Commonwealth is unlikely to be able to demonstrate that the Challenged Regulations will advance the stated goal of the Commonwealth to any significant degree.

24. There are many steps the Commonwealth and its political subdivisions can take to prevent or discourage smoking by minors. It is illegal in Massachusetts for any person to sell tobacco products to minors or for any person (other than a parent or guardian) to give tobacco products to minors. Mass. Gen. Laws c.270, § 6. The vigorous enforcement of such laws will address the need to reduce youth smoking without interfering with Plaintiff's legitimate commercial speech.

25. Moreover, in contrast to many other jurisdictions, Massachusetts has no general law imposing penalties on minors for possession or use of tobacco products. A credible risk of incurring a significant monetary or other penalty (such as suspension of a driver's license, e.g., 7 Vermont Stat. Ann. § 1005) will address the need to reduce youth smoking without interfering with Plaintiffs legitimate commercial speech.

26. The Commonwealth and its political subdivisions can also address underage smoking by means of educational programs. The Commonwealth has long touted the effectiveness of its antitobacco media campaigns. The recent settlement may result in the payment to Massachusetts of more than 57 billion over a period of years, funds that can be used to create additional anti-smoking programs.

27. The Attorney General's Office in particular has recognized the effectiveness of these alternatives to restricting the advertising of tobacco products to adult consumers. At a press conference at which he announced his decision to agree to the national settlement on behalf of the Commonwealth, Defendant's predecessor publicly announced the "Harshbarger Health Plan," which proposed to use the funds from the settlement to "reduce tobacco use among children and adults ... through tobacco control programs, school-based programs, research and evaluation, and cessation-on-demand programs." Moreover, the Harshbarger Health Plan would "expand enforcement at both the state and local levels against youth access tobacco at retail outlets." In addition, Defendant himself stated (in an April, 1999 op-ed piece in *The Boston Globe*) that "the proportion of illegal sales to minors fell from 48 percent to 8 percent in communities with a funded tobacco control program." Defendant characterized the Massachusetts Department of Public Health's tobacco control program as a "model for reducing smoking" that "has made a difference through education and enforcement."

28. Individually and cumulatively, the Challenged Restrictions impose excessive burdens on speech that will not materially advance the stated governmental interest of reducing teen smoking. The Challenged Regulations would undermine the manufacturers' ability to communicate to adult consumers at the point of purchase, through the mails, and through nontobacco merchandising. These restrictions are in addition to the preexisting restrictions prohibiting or curtailing communication through, *inter alia*, broadcast media, outdoor billboards and transit signs, and stadium displays and sponsorships. Taken together, these provisions severely restrict the Plaintiffs' ability to provide information to adult customers concerning Plaintiffs' products. The Challenged Restrictions also excessively infringe on the rights of adult smokers to receive information about the manufacturers' products. The benefits of the Challenged Regulations, if any,

can be otherwise achieved and do not justify the First Amendment restrictions imposed.

29. Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA") as a "comprehensive Federal program ... with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The "comprehensive" program was designed by Congress to ensure that "the public may be adequately informed about any adverse health effects of smoking," *id.* § 1331(1), while "commerce and the national economy" are "protected to the maximum extent consistent" with that objective, *id.* § 1331(2).

30. To ensure that the public is "adequately informed about any adverse health effects of cigarette smoking," id. § *1331* (1), FCLAA requires each package of cigarettes, and each cigarette advertisement, to carry one of four rotating health warnings, *see id.* § 1333.

31. FCLAA further explicitly provides that: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of § 1333 Id. § 1334(b).

32. All of Plaintiffs tobacco products properly advertised and sold in the Commonwealth of Massachusetts conform to the requirements of FCLAA.

33. The Challenged Regulations impose requirements or prohibitions based on smoking and health with respect to cigarettes which are packaged in conformity with FCLAA. The stated purpose of the Challenged Regulations to "address the incidence of cigarette smoking and smokeless tobacco use by children under legal age" has been repeatedly characterized by the defendant as a "public health" goal, as illustrated by the following examples:

- In a statement made when he accepted the Agreement on behalf of the Commonwealth, the Attorney General identified the "reduc[tion of] tobacco use among children and adults" as a "key public health goal" in Massachusetts. (Prepared Remarks Accepting Tobacco Settlement, November 20, 1998)

- The Chief of the Attorney General's Consumer Protection Bureau said that the proposed Challenged Regulations "would allow us to move aggressively to protec the health and safety of the children of Massachusetts in the event that Congress fails, on its own to create tough new marketing and advertising restrictions on the tobacco industry." *(Boston Globe,* Feb. 14, 1998, at B 1).

- In a public Internet "chat" session on April 22, 1997, the Attorney General stated that "there will be no settlement [of litigation between the Commonwealth and several tobacco companies] unless children can be fully protected, all public health issues are resolved fairly, including complete regulation of cigarette advertising.

  (http ..: //www. townonline. com/~ewton/Speak/ C~hat/transcript42297.html)

Claims for Relief

COUNT I (FIRST AMENDMENT)

34. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 33 of this Amended Complaint as though fully set forth herein.

35. Sections 21.04(2)(c), (2)(d), as well as 21.04(5) and (6) of the Challenged Regulations are null and void by reason of the First and Fourteenth Amendments to the United States Constitution. They individually and cumulatively impose excessive burdens on constitutionally protected commercial

speech by the plaintiff to adult consumers. These burdens will not materially advance the stated governmental interest of reducing use of tobacco products by minors. The government's asserted interest can be effectively served by alternative and more narrowly tailored means which do not restrict speech, and which do not proscribe advertising practices as "unfair or deceptive" without regard to the specific content of any particular advertisement. Moreover, these provisions are impermissibly overbroad. They restrict even non-commercial speech and they apply in settings that are physically and visually inaccessible to minors.

36. Plaintiff has no adequate remedy at law.

COUNT II (PREEMPTION)

37. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 36 of this Amended Complaint as though fully set forth herein.

38. Sections 21.04(1)(a), (l)(c), (1)(d), (5) and (6) of the Challenged Regulations are null and void by reason of Article VI, Section 2 of the United States Constitution ("Supremacy Clause") in that they are preempted by FCLAA.

39. Plaintiff has no adequate remedy at law.

COUNT III (COMMERCE CLAUSE AND DUE PROCESS)

40. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 39 of this Amended Complaint as though fully set forth herein.

41. Sections 21.04(1)(a), (c) and (d) of the Challenged Regulations are null and void by reason of the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution to the extent they purport to regulate or have the effect of regulating transactions and practices that do not occur

in Massachusetts, that do not involve Massachusetts consumers or that otherwise lack a sufficient nexus to Massachusetts, or to the extent they purport to regulate or have the effect of regulating national promotional programs from which Massachusetts, as a practical matter, cannot feasibly be excluded.

42. Plaintiff has no adequate remedy at law.

COUNT IV (EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT)

43. Plaintiff incorporates and realleges each and every allegation contained in paragraphs I through 42 of this Amended Complaint as though fully set forth herein.

44. Sections 21.04 (1)(a) and (d), and 21.04(2)(c) and (d) of the Challenged Regulations, as applied to retail outlets that are not accessible to individuals under the age of 18 years old, are not rationally related to the Commonwealth's stated objective of restricting tobacco use by underage individuals, do not rationally further a legitimate state interest in preventing "unfair or deceptive acts or practices" and therefore violate the Equal Protection and Due Process provisions of the Fourteenth Amendment of the United States Constitution.

45. Plaintiff has no adequate remedy at law.

COUNT V (42 U.S.C. § 1983)

46. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 41 of this Amended Complaint as though fully set forth herein.

47. By promulgating and threatening to enforce the Challenged Regulations, Defendant has unlawfully and substantially deprived Plaintiff of rights secured by the United States Constitution.

48. Defendant is a "person" under 42 U.S.C. § 1983 who has acted under color of state law to deprive Plaintiff of rights secured by the United States Constitution.

49. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

(A) enter a judgment declaring that 940 C.M.R. §§ 21.04(1)(a), (1)(c) and (1)(d), 21.04(2)(c) and (2)(d)i 21.04(5), and 21.04(6) are null and void;

(B) enter a permanent injunction enjoining Defendant and his agents from taking any action under or to enforce 940 C.M.R. §§ 21.04(1)(a), (1)(c), and (1)(d), 21.04(2)(c) and (2)(d), 21.04(5) and il.04(6);

(C) enter, after hearing, a preliminary injunction, pending final resolution of this action, enjoining Defendant and his agents from taking any action under or to enforce 940 C.M.R. §§ 21.04(l)(a), (1)(c) and (1)(d), 21.04(2)(c) and (2)(d), 21.04(5), and 21.04(6);

(D) award plaintiff its reasonable attorneys; fees and costs; and

(E) grant plaintiff such additional or different relief as it deems just and proper.

Respectfully submitted,

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BROWN & WILLIAMSON TOBACCO CORPORATION
By its attorney,

/s/ Verne W. Vance, Jr.

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Dated: June 10, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated June 23, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES TOBACCO COMPANY, Plaintiff, v. THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	Civil Action No. 99-CV-11135-WGY

ANSWER OF DEFENDANT THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

The defendant Thomas F. Reilly, as Attorney General of Massachusetts (hereafter the "Attorney General"), hereby answers the separately numbered paragraphs of the plaintiff's Complaint as follows.

1. With respect to the allegations of the first sentence of paragraph 1, the Attorney General states that the Challenged Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A. § 2(c) and denies the characterization "purportedly" in this sentence. The allegations of the first sentence otherwise require no response as they are merely a characterization of the plaintiffs' claims; to the extent that an answer to this sentence might be required, the Attorney General denies that the plaintiff is

entitled to any of the relief requested in this action. The Attorney General denies the allegations of the second sentence of paragraph 1.

2. No response is required to the allegations of paragraph 2 because the Regulations speak for themselves and the plaintiff's assertion that its advertising a conclusion of law that does not require a response.

3. No response is required to the allegations of paragraph 3 because the Regulations speak for themselves.

4. No response is required to the allegations of paragraph 4 because the Regulations speak for themselves.

5. No response is required to the allegations of paragraph 5 because the Regulations speak for themselves.

6. The Attorney General denies the allegations of paragraph 6.

7. The Attorney General admits the allegations of the first and second sentences of paragraph 7, except that the Attorney General is without knowledge or information sufficient to form a belief as to the truth of whether such manufacturing occurs "through United States Tobacco Manufacturing Limited Partnership." The Attorney General admits that USTC engages in advertising and marketing activities within the Commonwealth, and denies the remaining allegations of the third sentence of paragraph 7.

8. The Attorney General admits the allegations of paragraph 8, except that the Attorney General states that the Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A. § 2(c) and denies the characterization "purportedly" in the second sentence of paragraph 8.

9. Paragraph 9 does not require a response as it asserts only conclusions of law; to the extent that a response to the

allegations of this paragraph might be required, the Attorney General denies that the plaintiff is entitled to any of the declaratory or injunctive relief it has requested in this action.

10. Paragraph 10 does not require a response as it asserts only a conclusion of law.

11. The Attorney General admits that "USTC employs various methods of advertising and promoting its products in Massachusetts, including certain advertising" and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 11.

12. The Attorney General denies the allegations of the first sentence of paragraph 12. The second sentence of Paragraph 12 does not require a response as it asserts only a conclusion of law.

13. The Attorney General denies the allegations of paragraph 13.

14. The Attorney General denies the allegations of paragraph 14.

15. The Attorney General denies the allegations of paragraph 15.

16. The Attorney General denies the allegations of the first sentence of paragraph 16. The Attorney General denies the allegations of the second sentence of paragraph 16 and, in particular, denies that the prohibition embodied in the Regulations is "pervasive." With respect to the allegations of the third sentence of paragraph 16, the Attorney General admits that the plaintiff's advertising relates to an activity that is lawful for adults, and denies the remaining allegations of this sentence. The Attorney General states that the fourth sentence of paragraph 16 does not require a response, as it asserts only a conclusion of law; to the extent a response might be required, the Attorney General states that these allegations are too vague and general to allow the Attorney General to frame a response

and he is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations. The Attorney General denies the allegations of the last sentence of paragraph 16.

17. The Attorney General admits the allegations of the first sentence of paragraph 17. No response is required to the allegations of the second sentence of paragraph 17 because the Regulations speak for themselves. The Attorney General denies the allegations of the third and fourth sentences of paragraph 17, especially in view of 940 C.M.R. § 21.01.

18. The Attorney General denies that Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), and (2)(d) are irrational as applied to so called adult-only establishments and states that the remaining allegations of the first sentence of paragraph 18 do not require a response as the regulations speak for themselves. The Attorney General denies the allegations of the second sentence of paragraph 18. No response is required to the allegations of the third sentence of paragraph 18 because the regulations speak for themselves. The Attorney General denies the allegations of the fourth sentence of paragraph 18.

19. The Attorney General denies the allegations of the first sentence of paragraph 19. The allegations of the second sentence of paragraph 19 assert only a conclusion of law and therefore require no response. The Attorney General denies the allegations of the third sentence of paragraph 19.

Count I

20. The Attorney General incorporates and restates his responses to paragraphs 1 through 19 of this Answer as though fully set forth.

21. The Attorney General denies the allegations of paragraph 21.

22. The Attorney General denies the allegations of the first sentence of paragraph 22. The second sentence of Paragraph

22 does not require a response as it asserts only a conclusion of law.

Count II

23. The Attorney General incorporates and restates his responses to paragraphs 1 through 22 of this Answer as though fully set forth.

24. The Attorney General denies the allegations of paragraph 24.

25. The Attorney General denies the allegations of the first sentence of paragraph 25. The second sentence of Paragraph 25 does not require a response as it asserts only a conclusion of law.

Count III

26. The Attorney General incorporates and restates his responses to paragraphs 1 through 25 of this Answer as though fully set forth.

27. The Attorney General denies the allegations of paragraph 27.

28. The Attorney General denies the allegations of the first sentence of paragraph 28. The second sentence of Paragraph 28 does not require a response as it asserts only a conclusion of law.

Count IV

29. The Attorney General incorporates and restates his responses to paragraphs 1 through 28 of this Answer as though fully set forth.

30. The Attorney General denies the allegations of paragraph 30.

31. The Attorney General denies the allegations of the first sentence of paragraph 31. The second sentence of Paragraph

31 does not require a response as it asserts only a conclusion of law.

Count V

32. The Attorney General incorporates and restates his responses to paragraphs 1 through 31 of this Answer as though fully set forth.

33. The Attorney General denies the allegations of paragraph 33.

34. The Attorney General denies the allegations of the first sentence of paragraph 34. The second sentence of Paragraph 34 does not require a response as it asserts only a conclusion of law.

First Affirmative Defense

The Complaint, and each claim therein, fail to state a claim upon which relief can be granted.

Second Affirmative Defense

To the extent that any of the plaintiff's claims, expressly or impliedly, challenge the Attorney General's conduct as violative of Massachusetts law or seek relief to require the Attorney General to conform his conduct to Massachusetts law, such claims are barred by the Eleventh Amendment.

WHEREFORE, the defendant Thomas F. Reilly, as Attorney General of Massachusetts, respectfully requests that this Court (1) deny the plaintiff's request for a preliminary or permanent injunction; (2) deny with prejudice all of the relief requested in the Complaint; (3) dismiss the Complaint with prejudice; and (4) grant such other relief as proper.

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ William W. Porter

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Dated: June 23, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated June 28, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BROWN & WILLIAMSON TOBACCO CORPORATION,	)	
Plaintiff,	)	Civil Action No. 99-11121-WGY
v.	)	
THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

ANSWER OF DEFENDANT THOMAS F. REILLY,
ATTORNEY GENERAL OF
THE COMMONWEALTH OF MASSACHUSETTS

The defendant Thomas F. Reilly, as Attorney General of Massachusetts (hereafter the "Attorney General"), hereby answers the separately numbered paragraphs of the plaintiff's Amended Complaint as follows.

1. The first sentence of paragraph 1 requires no response as it is merely a characterization of the plaintiff's claims: to the extent that an answer to this sentence might be required, the Attorney General denies that the plaintiff is entitled to any of the relief requested in this action. The Attorney General denies the allegations of the second sentence of paragraph 1.

2. The Attorney General denies the allegations of the first sentence of paragraph 2, except that, as to the "stated goal of the Challenged Regulations," the regulations speak for

themselves. The Attorney General denies the allegations of the second, third and fourth sentences of paragraph 2. The allegations of the fifth sentence of paragraph 2 do not require a response as the Challenged Regulations speak for themselves; to the extent a response might be required, these allegations are denied. The Attorney General denies the allegations of the last sentence of paragraph 2.

3. The Attorney General denies the allegations of paragraph 3.

4. The allegations of the first and second sentence of paragraph 4 do not require a response as the Regulations speak for themselves: except that the Attorney General denies the allegations of the second sentence of paragraph 4 as to the purpose of the regulations because this is set forth in 940 C.M.R. § 21.01, which speaks for itself, and the quotation from Section 21.01 in this paragraph is incomplete. The Attorney General denies the allegations of the third sentence of paragraph 4.

5. The Attorney General denies the allegations of paragraph 5.

6. The Attorney General denies the allegations of paragraph 6.

7. The Attorney General denies the allegations of paragraph 7.

8. The Attorney General admits the allegations of paragraph 8.

9. The Attorney General admits the allegations of paragraph 9, except that the Attorney General states that the Challenged Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A, § 2(c) and denies the characterization "purportedly" in the second sentence of paragraph 9.

10. Paragraph 10 does not require a response as it asserts only conclusions of law; to the extent that a response might be required, the Attorney General denies that the plaintiff is entitled to any of the declaratory or injunctive relief it has requested in this action.

11. Paragraph 11 does not require a response as it asserts only a conclusion of law.

12. The Attorney General admits the allegations of the first sentence of paragraph 12. The Attorney General admits that the plaintiff "engages in advertising and promotional activities," and denies the remaining allegations of the second sentence of paragraph 12. The Attorney General admits the allegations of the third sentence of paragraph 12. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the fourth sentence of paragraph 12.

13. The allegations of the first sentence of paragraph 13 are too vague and ambiguous to permit the Attorney General to formulate a response: the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations, except that the Attorney General admits that Congress enacted 15 U.S.C. § 1335. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of second sentence of paragraph 13.

14. The Attorney General admits the allegations of the first sentence of paragraph 14, except that the Attorney General is unable to respond to whether such restrictions are "further" because this term in this context is too vague and ambiguous to allow a the Attorney General to frame a response: further answering, the Attorney General states that the Agreement speaks for itself. No response is required to the allegations of the second sentence of paragraph 14, because the

Agreement speaks for itself. The Attorney General admits the allegations of the third sentence of paragraph 14.

15. The Attorney General denies that the Agreement "allows" certain forms of advertising; at most, the Agreement does not prohibit certain forms of advertising; further answering, no response is required to the remaining allegations of the first sentence of paragraph 15, because the Agreement speaks for itself. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 15, except that the Attorney General admits that the Agreement does not prohibit brand advertising at retail establishments under a certain size limitation and subject to certain other restrictions set forth in the Agreement, and the Attorney General denies that tobacco advertising displayed at retail establishments is viewed only by adults or only by adult smokers. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third and fourth sentences of paragraph 15, except that the Attorney General admits that the retail store environment is a location where persons (including children and adult non-smokers) are involuntarily exposed to cigarette advertising. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the fifth sentence of paragraph 15, except that the Attorney General states that tobacco advertising at retail establishments is viewed by children and adult non-smokers and therefore denies that such advertising is viewed only by "consumers."

16. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 16, except that the Attorney General states that on-site advertising influences purchases, or attempted purchases, of tobacco products by minors. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the

allegations of the second, third and fourth sentences of paragraph 16.

17. The Attorney General denies the allegations of the first sentence of paragraph 17. The Attorney General denies the allegations of the second sentence of paragraph 17 except that the Attorney General admits that self-service displays give persons, of all ages, direct physical access to tobacco products.

18. The Attorney General denies the allegations of the first sentence of paragraph 18. The Attorney General admits that controlled service displays inhibit direct access to products, and denies the remaining allegations of the second sentence of paragraph 18. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third, fourth, fifth and sixth sentences of paragraph 18. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the seventh sentence of paragraph 18, except that the Attorney General admits that the provisions of 940 C.M.R. § 21.04(5)(b) reduce to some degree the interior retail space available to advertise tobacco products. The Attorney General denies the allegations of the eighth sentence of paragraph 18. With respect to the allegations of the ninth sentence of paragraph 18, the Attorney General denies the characterization of self service displays as a distinct "means of communication" and is otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations of this sentence. The allegations of the tenth sentence of paragraph 18 are too vague and ambiguous to allow the Attorney General to frame a response; the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations of the tenth sentence of paragraph 18.

19. The Attorney General denies the allegations of the first sentence of paragraph 19, except that the Attorney General admits that the regulations at 940 C.M.R. § 21.00 *et*

seq. were published in the Massachusetts Register on January 22, 1999, pursuant to the Attorney General's rulemaking powers under Mass. Gen. Laws c. 93A, § 2(c). The Attorney General admits the allegations of the second sentence of paragraph 19. No response is required to the allegations of the third, fourth and fifth sentences of paragraph 19, because the regulations speak for themselves and the Attorney General denies any allegation inconsistent with such regulations. The Attorney General denies the allegations of the sixth sentence of paragraph 19.

20. The Attorney General denies the allegations of the first sentence of paragraph 20. The Attorney General denies the allegations of second sentence of paragraph 20, and in particular denies that the plaintiff's advertising is only viewed by and accessible to adults.

21. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

22. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 22; further answering, the allegations in this sentence concerning what Sections 21.04(1)(a), (c) and (d) prohibit are too vague and general to allow the Attorney General to frame a reasonable response and, in any event, the provisions of Section 21.04(1)(a), (c) and (d) speak for themselves and no response is therefore required to the allegation concerning what these sections prohibit. The Attorney General denies the allegations of the second and third sentences of paragraph 22, especially in view of 940 C.M.R. § 21.01.

23. The Attorney General states that the purpose of the regulations set forth at 940 C.M.R. § 21.00, *et seq.* is set forth in 940 C.M.R. § 21.01, which speaks for itself, and the Attorney General denies the allegations of the first sentence of

paragraph 23 because the quotation from Section 21.01 is incomplete. The Attorney General denies the allegations of the second sentence of paragraph 23. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 23. The Attorney General denies the allegations of the fourth and fifth sentences of paragraph 23.

24. The Attorney General admits the allegations of the first and second sentences of paragraph 24. The Attorney General denies the allegations of the third sentence of paragraph 24.

25. As to the first sentence of paragraph 25, the Attorney General admits that Massachusetts does not have a "general law imposing penalties on minors for possess or use of tobacco products," and is without knowledge or information sufficient to form a belief as to the truth of whether this is in "contrast to many other jurisdictions." The Attorney General denies the allegations of the second sentence of paragraph 25.

26. The Attorney General states that the Commonwealth can seek to address, in part, the illegal sales of cigarettes to minors by educational programs and denies any other or additional allegations of the first sentence of paragraph 26. The Attorney General admits that the Massachusetts Department of Public Health has made public certain information to show the benefits of its anti-tobacco media campaigns, and denies any other allegations of the second sentence of paragraph 26. The Attorney General admits the allegations of the third sentence of paragraph 26, except that the Attorney General states that such funds can only be used subject to, and consistently with, legislative appropriation, which could include appropriations for tobacco related programs.

27. The Attorney General denies the allegations of the first sentence of paragraph 27. The Attorney General admits

the allegations of the second, third, fourth and fifth sentences of paragraph 27, except that the Attorney General denies that statements concerning the Harshbarger Health Plan (HHP) or statements in the April 1999, op-ed piece recognize that the HHP or other existing programs are or would be an adequate or sufficient alternative to the regulations at 940 C.M.R. § 21.00, *et seq.*

28. The Attorney General denies the allegations of the first sentence of paragraph 28 and, further answering, states that the "governmental interest" with respect to the regulations is as set forth in the regulations. The allegations of the second sentence of paragraph 28 do not require a response as the Challenged Regulations speak for themselves; to the extent a response might be required, these allegations are denied. The allegations of the third sentence of paragraph 28 are too vague and general to allow the Attorney General to frame a reasonable response: the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations. The Attorney General denies the allegations of the fourth, fifth and sixth sentences of paragraph 28.

29. No response is required to the allegations of paragraph 29 because the FCLAA speaks for itself; to the extent a response to these allegations might be required, they are denied because the quotations from the FCLAA are incomplete and out of context.

30. No response is required to the allegations of paragraph 30 because the FCLAA speaks for itself; to the extent a response to these allegations might be required, they are denied because the quotation from and reference to the FCLAA are incomplete and out of context.

31. No response is required to the allegations of paragraph 31 because the FCLAA speaks for itself.

32. The allegations of paragraph 32 are too vague and ambiguous to allow the Attorney General to frame a response: the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32.

33. The Attorney General denies the allegations of paragraph 33.

Count I

34. The Attorney General incorporates and restates his responses to paragraphs 1 through 33 of this Answer as though fully set forth.

35. The Attorney General denies the allegations of paragraph 35.

36. Paragraph 36 does not require a response as it asserts only a conclusion of law.

Count II

37. The Attorney General incorporates and restates his responses to paragraphs 1 through 36 of this Answer as though fully set forth.

38. The Attorney General denies the allegations of paragraph 38.

39. Paragraph 39 does not require a response as it asserts only a conclusion of law.

Count III

40. The Attorney General incorporates and restates his responses to paragraphs 1 through 39 of this Answer as though fully set forth.

41. The Attorney General denies the allegations of paragraph 40 because Section 21.04(1) only regulates transactions or practices that occur in Massachusetts involving

Massachusetts consumers and does not regulate or have the effect of regulating national promotional programs from which Massachusetts cannot be feasibly excluded.

42. Paragraph 42 does not require a response as it asserts only a conclusion of law.

Count IV

43. The Attorney General incorporates and restates his responses to paragraphs 1 through 42 of this Answer as though fully set forth.

44. The Attorney General denies the allegations of paragraph 44.

45. Paragraph 45 does not require a response as it asserts only a conclusion of law.

Count V

46. The Attorney General incorporates and restates his responses to paragraphs 1 through 45 of this Answer as though fully set forth.

47. The Attorney General denies the allegations of paragraph 47.

48. The Attorney General denies the allegations of paragraph 48.

49. Paragraph 49 does not require a response as it asserts only a conclusion of law.

First Affirmative Defense

The Complaint, and each claim therein, fail to state a claim upon which relief can be granted.

Second Affirmative Defense

To the extent that any of the plaintiff's claims, expressly or impliedly, challenge the Attorney General's conduct as

violative of Massachusetts law or seek relief to require the Attorney General to conform his conduct to Massachusetts law, such claims are barred by the Eleventh Amendment.

WHEREFORE, the defendant Thomas F. Reilly, as Attorney General of Massachusetts, respectfully requests that this Court (1) deny the plaintiff's request for a preliminary or permanent injunction; (2) deny with prejudice all of the relief requested in the Complaint; (3) dismiss the Complaint with prejudice, and (4) grant such other relief as is proper.

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ William W. Porter

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Dated: June 28, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated July 1, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSOLIDATED CIGAR CORP.; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; and TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.,	)	Civil Action No. 99 CV 11270 WGY
Plaintiffs,	)	
v.	)	
THOMAS REILLY, in his official capacity as Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

AMENDED COMPLAINT

Nature of Action

1. Plaintiffs, each a manufacturer or retailer of cigars sold throughout the United States including in Massachusetts, bring this action to declare null and void, and to enjoin enforcement of, 940 CMR § 22.00 et seq. (the "Challenged Regulations")

(attached as Exhibit A) promulgated by Defendant, the Attorney General of the Commonwealth of Massachusetts. The Challenged Regulations impose unconstitutional restrictions on Plaintiffs' ability to package, advertise, promote, and sell cigars and little cigars, as defined in 940 CMR § 22.03 (collectively, "cigars").

The Challenged Regulations

2. The two enumerated objectives of the Challenged Regulations are to inform "Massachusetts consumers" about the alleged health risks of cigar smoking and "to prevent access to [cigars] by underage consumers." 940 CMR § 22.01. The Challenged Regulations purportedly seek to achieve those purposes by imposing the following restrictions on the packaging, advertising, promotion, and sale of cigars:

(a) The Challenged Regulations restrict cigar packaging by:

(i) requiring that machine-manufactured cigars, but not hand- rolled premium cigars, display a label that would occupy twenty-five percent of the front or top panel of the package, whichever is larger, stating one of two messages: (1) "Warning: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug," or (2) "Warning: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products" (collectively, the "Massachusetts Attorney General's Cigar Statement"), 940 CMR § 22.04(1), (2); and

(ii) requiring that manufacturers and distributors regularly rotate each label constituting the Massachusetts Attorney General's Cigar Statement in alternating sequence on the packages of each brand of machine-manufactured cigars, 940 CMR § 22.04(2) (d).

(b) The Challenged Regulations restrict cigar advertising, promotion, and sale by:

(i) requiring that retailers display one of the two labels constituting the Massachusetts Attorney General's Cigar Statement wherever hand-rolled cigars are sold or machine-manufactured cigars are sold singly, 940 CMR § 22.06(2)(e);

(ii) requiring that twenty percent of the surface area of any cigar advertisement or statement promoting cigars be set aside for one of the two labels constituting the Massachusetts Attorney General's Cigar Statement, 940 CMR § 22.05(1), (2);

(iii) banning all cigar advertising, regardless of whether it is deceptive or unfair, that is outdoors or visible from the outdoors within a thousand-foot radius of any elementary or secondary school, or any public playground, athletic field, swimming pool, baseball diamond, and/or basketball court (except for a single retailer announcement, "Tobacco Products Sold Here"), 940 CMR § 22.06(5)(a);

(iv) banning the placement of cigar advertisements, cigar packages bearing a trademark, or any cigar promotional statement any portion of which is placed lower than five feet from the floor, in retail establishments accessible to persons under eighteen years of age and located within a thousand-foot radius of any elementary or secondary school, or any public playground, athletic field, swimming pool, baseball diamond, and/or basketball court, 940 CMR § 22.06(5)(b);

(v) restricting the sale of cigars in any retail outlet in any manner other than a face-to-face exchange, 940 CMR § 22.06(2)(a),

(vi) banning the use of self-service displays in retail outlets, 940 CMR § 22.06(2)(c),

(vii) requiring retail outlets to place all cigars out of the reach of all consumers, 940 CMR § 22.06(2)(d), and

(viii) banning cigar sales from vending machines in retail outlets, except from vending machines controlled by store personnel in facilities licensed to serve alcoholic beverages for consumption, 940 CMR §§ 22.06(2)(a), (4)(b).

(c) The Challenged Regulations also ban the sampling of cigars, promotional giveaways of cigars, the sale of cigars with any gift or giveaway, the distribution of cigars by redemption of coupons, and the distribution of cigars through the mail, except where the person receiving the mail order cigars supplies a copy of a "valid government-issued identification." 940 CMR §§ 22.06(1)(a), (c) & (d), 22.06(4)(a).

Nature of the Claims

3. The Challenged Regulations, specifically including but not limited to §§ 22.04(1) and (2), 22.05(1) and (2), 22.06(1)(a), 22.06(2)(c), (d), and (e), 22.06(5), and 22.06(6), violate the First and Fourteenth Amendments to the United States Constitution by:

(a) restricting Plaintiffs' rights to communicate with their customers and the public in the exercise of free commercial speech, and

(b) requiring Plaintiffs and others to publish the Massachusetts Attorney General's Cigar Statement.

* * * *

7. The implementation of the Challenged Regulations will cause irreparable harm to Plaintiffs.

8. The Challenged Regulations are unconstitutional and invalid and should be preliminarily and permanently enjoined.

Parties

9. Plaintiff Consolidated Cigar Corporation ("Consolidated," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Ft. Lauderdale, Florida. Consolidated manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. Consolidated sells cigars under brand names including but not limited to Dutch Masters, Backwoods, Muriel, AyC, H. Upmann, Montecristo, Don Diego, and El Producto.

10. Plaintiff General Cigar Co., Inc. ("General Cigar," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in New York, New York. General Cigar manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. General Cigar sells its cigars under brand names including but not limited to Macanudo, Cohiba, Partagas, Punch, Hoyo de Monterey, Bances, Top Stone, Villazon Deluxe, and Villa de Cuba.

11. Plaintiff Havatampa, Inc. ("Havatampa," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Tampa, Florida. Havatampa manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. Havatampa sells its

cigars under brand names including but not limited to Hav-A-Tampa, Phillies, Tampa Nugget, Erik, and Omega.

12. Plaintiff John Middleton, Inc. ("JMI," a "Plaintiff Manufacturer") is a Pennsylvania corporation with its principal place of business in King of Prussia, Pennsylvania. JMI manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. JMI sells its cigars under brand names including but not limited to Black & Mild, Gold & Mild, Middleton's Cherry Blend, Soft & Sweet Vanilla, and Soft Cherry Vanilla.

13. Plaintiff L.J. Peretti Co., Inc. ("Peretti," a "Plaintiff Retailer") is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. Peretti is a tobacconist; it sells only tobacco and related products, including cigars, to adult consumers. Peretti operates one retail store near the Boston Common.

14. Plaintiff Swedish Match North America, Inc. ("Swedish Match," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Richmond, Virginia. Swedish Match, through its wholly owned subsidiary Swedish Match Cigars, Inc., manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed, and sold throughout the United States including in Massachusetts. Swedish Match sells its cigars under brand names including but not limited to White Owl, Garcia Y Vega, Tiparillo, Tijuana Smalls, Braves and Willow Tips by William Penn, and Robert Burns. In addition, Swedish Match is the sole United States importer of cigars sold under the brand name Montague.

15. Plaintiff Swisher International, Inc. ("Swisher," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Darien, Connecticut. Swisher manufactures its cigars outside Massachusetts, and its cigars

are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. Swisher sells cigars under brand names including but not limited to Swisher Sweets, King Edward, Optimo, Blackstone, Bering, Siglo 21 and La Primadora.

16. Plaintiff Tobacco Exporters International (USA) Ltd. ("Tobacco Exporters," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Tucker, Georgia. Tobacco Exporters manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed, and sold throughout the United States including in Massachusetts. Tobacco Exporters sells its cigars under brand names including but not limited to Winchester.

17. Defendant Thomas Reilly is the Attorney General of the Commonwealth of Massachusetts. On January 22, 1999, Defendant's predecessor promulgated the Challenged Regulations purportedly pursuant to the Attorney General's authority under Massachusetts General Laws c.93A, § 2(c).

Jurisdiction and Venue

18. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65.

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

Facts Applicable to All Claims

20. Each Plaintiff Manufacturer's brands of cigars have been brought from their place of manufacture outside Massachusetts to be sold in Massachusetts from before 1998 continuously to the present. Each Plaintiff Manufacturer desires that its brands of cigars continue to be brought from other states and foreign countries into Massachusetts for sale.

21. In addition to selling cigars in its Massachusetts store, Plaintiff Retailer promotes the sale of cigars to individuals throughout the United States and around the world. Plaintiff Retailer wishes to continue selling cigars outside Massachusetts.

22. The Challenged Regulations require compliance with labeling, advertising, and point-of-sale requirements for Plaintiff Manufacturers' cigars to continue to be sold, and for Plaintiff Retailer to continue to sell cigars, in the Commonwealth of Massachusetts. The Challenged Regulations become effective on August 1, 1999, although Defendant has stated that he will amend the Challenged Regulations to extend the effective date until February 1, 2000. There exists an actual controversy, justiciable in character, between Plaintiffs and Defendant as to whether the Challenged Regulations are lawful under the United States Constitution. Compliance with the challenged Regulations would violate Plaintiffs' constitutional rights and cause each Plaintiff irreparable injury, as would noncompliance.

23. Plaintiffs engage in advertising and promotional activities that are intended to promote sales of cigars to adult smokers. Cigar manufacturers and retailers generally have employed several methods for advertising and promoting cigars, including but not limited to the use of valuable and distinctive trademarks and product packages and displays, print advertising, coupons, radio advertising, various forms of price offers, promotional materials in retail outlets, and distribution and display of promotional materials through other channels.

24. Plaintiff Manufacturers' cigars are advertised in national and regional publications, such as Chief Executive, Cigar Aficionado, Esquire, Field & Stream, Financial World, Forbes, Game & Fish, Golf Magazine, Gourmet, J&R Catalogue, Hemispheres (United Airlines in-flight magazine), Senior Golf, Smoke, Smokeshop, and Wine Spectator.

25. On-site advertising of cigars also constitutes an important means by which cigars are promoted. Convenience stores, gas stations, drug stores, discount stores, tobacconists, and other retail outlets promote sales of cigars, like most other products, by using self-service in-store displays and advertisements. In some cases, manufacturers and retail outlets engage in cooperative advertising where cigars are promoted along with other products on sale at the stores. To stimulate traffic into such stores and sales in the store, it is important to communicate to adult consumers that they can purchase popular brands of cigars inside the store.

26. Retail product display is another critical means by which cigar manufacturers compete with one another and manufacturers and retailers communicate with adult consumers. In-store self-service displays of cigars provide price and other brand information that is crucial to the adult consumers' choice among products. Because of major differences in the look and feel of cigar brands, adult consumers must have direct access to the cigar in its package to make comparisons with other cigars. For example, price comparison between brands is facilitated by comparing cigars and/or cigar packages side-by-side. Importantly, such displays permit the adult consumer to examine the product directly in the manner that the adult consumer chooses, and then make an immediate purchase decision. The manner in which adult consumers examine cigars at retail establishments and make their cigar purchase decisions has been essentially unchanged over the years.

* * * *

36. Although the Challenged Regulations refer to a "false perception that cigars are a safe alternative to cigarettes," there are no findings that Plaintiffs' cigar advertising and promotion in any way causes that claimed perception. There are no findings that the claimed perception is a significant factor in cigar purchase decisions. There are no

findings that any cigar advertisements promote the use of cigars as a safer or healthier alternative to cigarette smoking. There are no findings that any cigar advertisements and promotions (such as cigar dinners) are not directed to adult consumers.

37. The effect of the advertising restrictions in the Challenged Regulations is to ban all cigar advertisements that can be viewed from the outdoors in large sections of virtually every populated area of Massachusetts, regardless of whether these advertisements are deceptive or unfair.

* * * *

41. The Challenged Regulations, specifically including but not limited to § 22.06(2)(c) and (d), require Plaintiff Retailer—even though it operates an adult-only store—and all other cigar retailers to place products out of reach of consumers and in a location accessible only to outlet personnel. As a result, Plaintiff Retailer's customers will not be able to see, touch or smell the cigars it sells. To individuals who purchase cigars, such tactile interaction with the products is preferred. A cigar is not a fungible commodity, like a candy bar or a can of soda, that can be purchased without an individual inspection. Each brand of cigar has very individual characteristics. If Plaintiff Retailer's and other retailers' customers are denied the opportunity personally to compare and test individual cigars, the customary manner in which adult consumers have selected and purchased cigars over the years will be altered, and the product information available to adult consumers at the point of purchase will be severely limited. As a result, Plaintiff Retailer's business, like those of other retailers, will be injured.

42. Moreover, the Challenged Regulations, specifically including but not limited to § 22.06(5), require cigar retailers to remove all signs visible from the street advertising their stores and products (except for a non-descript statement

"Tobacco Products Sold Here") if their stores operate fewer than 1000 feet from, among other things, a school, playground, or baseball diamond or basketball court. Such a restriction will have drastic effects on cigar retailers. For instance, because Plaintiff Retailer's store is located less than 1000 feet from Boston Common, which contains baseball diamonds, Plaintiff Retailer will be forced to remove any promotional materials, advertisements, and signs from its front window. As a result, Plaintiff Retailer, like many other cigar retailers, will not be able to communicate to its adult customers information about its cigars, including even the fact that it sells them. Therefore, Plaintiff Retailer's business, like those of other retailers, will suffer.

43. In addition, the Challenged Regulations, specifically including but not limited to §§ 22.06(2)(c) and (d), will compel Plaintiff Retailer and other retailers to redesign their stores. By effectively requiring such retailers to make all cigars inaccessible to their customers, the Challenged Regulations will oblige retailers to expand restricted areas (where physically possible to do so), such as those behind the counter, or reduce the number and selection of cigars available for sale.

44. Significantly, the Challenged Regulations, specifically including but not limited to § 22.06(3)(a), require retailers who, like Plaintiff Retailer, employ six or more individuals to use their own funds to hire a "secret shopper." The secret shopper will periodically and surreptitiously visit the stores, including adult-only stores, to spy on employees to ensure compliance with the Challenged Regulations. Such an expense would dramatically diminish Plaintiff Retailer's and other retailers' profits.

45. The Challenged Regulations, specifically including but not limited to § 22.06(2)(c) and (d), that require retailers to make cigars inaccessible to consumers, also severely affect Plaintiff Manufacturers. The practical effect of these

restrictions will be to make many brands and styles of cigars invisible to consumers in the store and effectively eliminate a critically important channel of communication with adult consumers. As a result, Plaintiff Manufacturers' businesses will suffer.

46. Defendant's complete prohibition on the use of self-service displays, even where no issue of underage access is presented, also infringes on the rights of adult consumers to receive useful product information. 940 CMR § 22.06(2)(c). Such displays are a standard competitive tool available to marketers of other lawful consumer products. The prohibition, especially when combined with the other advertising restrictions contained in the Challenged Regulations, means that as a practical matter the adult consumer is deprived of information relevant to his choice at the very moment when that choice is being made and the information is of utmost importance.

47. Plaintiffs, and cigar manufacturers and retailers generally, employ various marketing and promotional programs intended to attract adult cigar smokers and enhance the loyalty of adult smokers to particular brands. These programs play a significant role in the competition among cigar manufacturers. They also provide to adult consumers information about cigars that permits them to make informed choices about quality, price, and other competitive attributes of cigars.

48. There are many steps Defendant and his agents could take to advance Defendant's stated purpose of "prevent[ing] access to cigars by underage consumers" (940 CMR § 22.01) without restricting or eliminating traditional channels of communication with adult consumers and customary methods of adult access to cigars at the time of the purchase decision, and without burdening interstate commerce. For example, it is illegal in Massachusetts for any person to sell tobacco products such as cigars to minors, or for any person (other than a parent or guardian) to give tobacco products to

minors. Mass. Gen. Laws c.270, § 6. Vigorous enforcement of such laws can reduce youth smoking. The Commonwealth and its political subdivisions can also address underage smoking by means of educational programs. The Commonwealth has long claimed the effectiveness of its anti-tobacco media campaigns. For example, Defendant himself stated (in an April 6, 1999 op-ed piece in *The Boston Globe*) that as a result of local education and law enforcement efforts "the proportion of illegal sales to minors fell from 48 percent to 8 percent in communities with a funded tobacco control program." Defendant characterized the Department of Public Health's tobacco control program as a "model for reducing smoking" that "has made a difference through education and enforcement." Id.

50. Implementation of the Challenged Regulations will cause irreparable harm to each Plaintiff who faces the denial of its free speech rights and the severe restriction of its ability to compete for retail sales. In addition, implementation of the Challenged Regulations will cause harm to adult cigar consumers who will be denied lawful access to, and information regarding, products they may wish to purchase. In addition, the profound interference with the interstate commerce in cigars caused by the Challenged Regulations will severely burden the business of Plaintiff Manufacturers.

51. The Attorney General of the Commonwealth of Massachusetts is a person within the meaning of 42 U.S.C. § 1983 because Plaintiffs seek to enjoin him from taking actions in his official capacity.

Claims for Relief

COUNT I (FREE SPEECH)

52. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 through 51 of this Complaint as though fully set forth herein.

53. The Challenged Regulations, specifically including but not limited to §§ 22.04(1) and (2), 22.05(1) and (2), 22.06(1)(a), 22.06(2)(c), (d) and (e), 22.06(5), and 22.06(6), are null and void by reason of the First and Fourteenth Amendments to the United States Constitution because they impose prohibitions and restrictions on constitutionally protected commercial speech by Plaintiffs to adult consumers. The Defendant cannot show the prohibitions and restrictions will directly and materially advance and are reasonably related to the stated government interests. Defendant's interest can be served effectively by means that do not unconstitutionally restrict speech.

54. Plaintiffs have no adequate remedy at law.

* * * *

Respectfully submitted,

CONSOLIDATED CIGAR CORP.; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; AND TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.

By their attorneys,

/s/ Peter G. Hermes

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Dated: July 1, 1999

[Dated July 22, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSOLIDATED CIGAR CORP., et al.,	)	
	)	Civil Action No.
Plaintiffs,	)	99-CV-11270-WGY
v.	)	
THOMAS F. REILLY, as Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

ANSWER OF DEFENDANT THOMAS F. REILLY,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS,
TO THE AMENDED COMPLAINT

The defendant Thomas F. Reilly, as Attorney General of Massachusetts (hereafter the "Attorney General"), hereby answers the separately numbered paragraphs of the plaintiff's Amended Complaint as follows

1. The first sentence of paragraph 1 requires no response as it is merely a characterization of the plaintiffs' claims; to the extent that an answer to this sentence might be required, the Attorney General denies that the plaintiffs are entitled to any of the relief requested in this action and admits that a copy of 940 CMR 22.00, *et seq.* is attached as Exhibit A to the Amended Complaint and admits that the Attorney General of Massachusetts promulgated 940 CMR 22.00, *et seq.* The

Attorney General denies the allegations of the second sentence of paragraph 1.

2. The allegations of the first sentence of paragraph 2 do not require a response because the regulations speak for themselves; to the extent a response to these allegations might be required, they are denied as the quotations from the regulations are incomplete and out of context. With respect to the allegations of the second sentence of paragraph 2, the Attorney General denies the characterization "purportedly" and states that the remaining allegations do not require a response as the regulations speak for themselves. The allegations of paragraphs 2(a), 2(b) and 2(c) do not require a response because the regulations speak for themselves; to the extent a response might be required, the Attorney General denies any allegation inconsistent with the regulations.

3. The Attorney General denies the allegations of paragraph 3.

* * * *

7. The Attorney General denies the allegations of paragraph 7.

8. The Attorney General denies the allegations of paragraph 8.

9. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9.

10. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

11. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11.

12. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13.

14. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14.

15. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. The Attorney General admits the allegations of paragraph 17, except that the Attorney General states that the Challenged Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A, § 2(c) and denies the characterization "purportedly" in the second sentence of paragraph 17.

18. Paragraph 18 does not require a response as it asserts only conclusions of law; to the extent that a response to the allegations of this paragraph might be required, the Attorney General denies that the plaintiffs are entitled to any of the declaratory or injunctive relief they have requested in this action.

19. Paragraph 19 does not require a response as it asserts only a conclusion of law.

20. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20.

21. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

22. The allegations of the first sentence of paragraph 22 do not require a response because the regulations speak for themselves. The Attorney General admits the allegations of the second sentence of paragraph 22, and states that he has filed an emergency regulation to amend the regulations to make them effective February 1, 2000. The third sentence of paragraph 22 does not require a response as it asserts only a conclusion of law. The Attorney General denies the allegations of the fourth sentence of paragraph 22.

23. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 23. The Attorney General admits the allegation that "cigar manufacturers and retailers generally have employed several methods for advertising and promoting cigars," and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the second sentence of paragraph 23.

24. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 24.

25. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 25. The Attorney General admits the allegations of the second sentence of paragraph 25, except that the Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations that retail outlets promote sales of cigars "like most other products." The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third and fourth sentences of paragraph 25.

26. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first and second sentences of paragraph 26. The Attorney General denies the allegations of the third and fourth sentences of paragraph 26. The Attorney General admits that self service displays permit all persons (adults and minors) to examine cigar products directly and in the manner that the person chooses, and then make a purchase decision, and, further answering, states that other modes of sale permitted under the regulations permit a similar examination and purchase decision; the Attorney General denies the remaining allegation of the fifth sentence of paragraph 26 or any allegations of this sentence inconsistent with the foregoing. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the sixth sentence of paragraph 26.

* * * *

36. The allegations of paragraph 36 do not require a response because the regulations speak for themselves; to the extent that a response to these allegations might be required, the Attorney General states that no applicable provision of law required the Attorney General to make express "findings" as referred to in paragraph 36, admits that the text of the regulations does not contain the "findings" described in this sentence, and denies the remaining allegations of paragraph 36.

37. The Attorney General denies the allegations of paragraph 37.

* * * *

41. The allegations of the first sentence of paragraph 41 do not require a response because the regulations speak for themselves, except that the Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegation that Plaintiff Retailer "operates an adult-only store." The Attorney General denies the allegations of the

second sentence of paragraph 41. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third, fourth and fifth sentences of paragraph 41. With respect to the allegations of the sixth sentence of paragraph 41, the Attorney General denies, in particular, that Plaintiff Retailer's and other retailers' customers will be denied the opportunity personally to compare and test individual cigars, and therefore also denies the remaining allegations of this sentence. The Attorney General denies the allegations of the last sentence of paragraph 41.

42. The Attorney General denies that the regulations require retailers to remove signs advertising their stores and states that no response is required to the other allegations of the first sentence of paragraph 42 because the regulations speak for themselves; to the extent a response to these allegations might be required, they are denied. The Attorney General denies the allegations of the second sentence of paragraph 42. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 42. The Attorney General denies the allegations of the fourth and fifth sentences of paragraph 42.

43. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43.

44. The Attorney General denies the allegations of the first sentence of paragraph 44. The allegations of the second sentence of paragraph 44 do not require a response because the regulations speak for themselves; to the extent that a response might be required, the Attorney General states that these allegations are too vague and ambiguous to allow him to frame a response, and he is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations. The Attorney General denies the allegations of the last sentence of paragraph 44.

45. The Attorney General denies the allegations of paragraph 45.

46. The Attorney General denies the allegations of the first sentence of paragraph 46. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 46. The Attorney General denies the allegations of the third sentence of paragraph 46.

47. Because the allegations of paragraph 47 do not specify or describe the "marketing and promotional programs" that are referred to, the allegations of this paragraph are too vague and general to allow the Attorney General to frame a response; the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 47.

48. With respect to the allegations of the first sentence of paragraph 48, the Attorney General admits that there are certain steps that he has taken and could continue to take, in addition to promulgating the regulations, that would seek to advance the goal of preventing access to cigars by underage consumers; the Attorney General denies the remaining allegations of the first sentence of paragraph 48 which purport to characterize the regulations and denies all other allegations of the first sentence of paragraph 48. The Attorney General admits the allegations of the second and third sentences of paragraph 48. With respect to the allegations of the fourth sentence of paragraph 48, the Attorney General admits that the Commonwealth can seek to address underage smoking by means of educational programs, but denies that this, alone, is adequate. With respect to the allegations of the fifth sentence of paragraph 48, the Attorney General admits that the Massachusetts Department of Public Health has made public certain information to show the benefits of its anti-tobacco media campaigns, and denies any other allegations of this sentence. With respect to the allegations of the sixth and

seventh sentences of paragraph 48, the Attorney General admits that he made certain statements in an op-ed piece in the *Boston Globe* on April 6, 1999, and states that such statements speak for themselves and denies that such statements indicate that existing Massachusetts tobacco control programs are or would be an adequate or sufficient alternative to the regulations at 940 C.M.R. § 21.00, *et seq.* and 940 C.M.R. §22.00, *et seq.*

* * * *

50. The Attorney General denies the allegations of paragraph 50.

51. Paragraph 51 does not require a response as it asserts only conclusions of law.

Count I

52. The Attorney General incorporates and restates his responses to paragraphs 1 through 51 of this Answer as though fully set forth.

53. The Attorney General denies the allegations of paragraph 53.

54. Paragraph 54 does not require a response as it asserts only a conclusion of law.

* * * *

First Affirmative Defense

The Amended Complaint, and each claim therein, fail to state a claim upon which relief can be granted.

Second Affirmative Defense

To the extent that any of the plaintiffs' claims, expressly or impliedly, in whole or in part, challenge the Attorney General's conduct as violative of Massachusetts law or seek relief to require the Attorney General to conform his conduct to

Massachusetts law, such claims are barred by the Eleventh Amendment.

WHEREFORE, the defendant Thomas F. Reilly, as Attorney General of Massachusetts, respectfully requests that this Court (1) deny the plaintiffs' request for a preliminary or permanent injunction; (2) deny with prejudice all of the relief requested in the Complaint; (3) dismiss the Complaint with prejudice, and (4) grant such other relief as is proper.

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ William W. Porter

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Dated: July 22, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Filed October 15, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	CIVIL ACTION NO.99-11118-WGY
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	

PHILIP MORRIS INCORPORATED,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

AFFIDAVIT OF NANCY COVILLE

I, Nancy Coville, depose and state the following:

1. I am an Education Specialist in Learning Support Services at the Massachusetts Department of Education ("DOE"). I have held this position since 1993. I have a bachelor degree from Framingham State College and have taken additional graduate courses. As part of my job, I supervise the administration of the Health Protection Fund Grants.

2. DOE distributes the Health Protection Fund Grants to public school districts across Massachusetts. The amount of each grant is based on the student population of each school

district, with approximately $24 allocated for each child. In fiscal year 1998, the Health Protection Fund Grants to individual public school districts totaled approximately $21 million.

3. The purpose of the grants is to provide comprehensive health education to students with a focus on tobacco education, prevention, and cessation. Each school district must submit an application for a Health Protection Fund Grant for each fiscal year. The grant application has certain stated priorities to be addressed by the school districts. Among the stated priorities are: tobacco prevention education for all students, including smoking cessation programs; and a local health education program which includes the maintenance of a healthy school climate and environment, with special emphasis on enforcement of an effective Tobacco Free Schools policy. The document attached as Exhibit A to this affidavit is a true and accurate copy of the Health Protection Fund Grant application form for fiscal year 2000.

4. In part because of the Health Protection Fund Grants: 95% of health educators are now teaching tobacco use prevention, with the greatest emphasis being placed on middle school students; all Massachusetts school districts now have tobacco-free school policies; over half of school districts provide tobacco education to parents; and, three-quarters have tobacco control programs linked to community programs.

* * * *

SIGNED AND SWORN UNDER THE PAINS AND PENALTIES OF PERJURY THIS 12th DAY OF OCTOBER, 1999.

/s/ Nancy Coville
Nancy Coville

Sworn before me this 12th day of October, 1999.

/s/ Rhoda E. Schneider
Notary Public

My Commission expires:

[Filed October 15, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	CIVIL ACTION NO.99-11118-WGY
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	

PHILIP MORRIS INCORPORATED,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)
BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

AFFIDAVIT OF GREGORY N. CONNOLLY

I, Gregory N. Connolly, depose and state the following:

1. I am the Director of the Massachusetts Tobacco Control Program (MTCP) of the Massachusetts Department of Public Health. I have held this position since the formation of the Massachusetts Tobacco Control Program in 1993. From 1986 to 1993 I was the director of the Office on Non-Smoking and Health. I have a D.M.D. from Tufts University School of Dental Medicine, and a Masters degree from the Harvard University School of Public Health.

2. As Director of the MTCP, I control all aspects of the MTCP.

3. The MTCP is funded by appropriations from the Massachusetts Health Protection Fund, which receives revenue from a 25-cent excise tax on each pack of cigarettes and 25 percent tax on each unit of smokeless tobacco sold in the Commonwealth. The MTCP budget for fiscal year 1995 was $43.1 million. The MTCP budget for fiscal year 1996 was $41.8 million. The MTCP budget for fiscal year 1997 was $36.8 million. The MTCP budget for fiscal year 1999 is $36.9 million.

4. The MTCP funds, supports or implements a wide variety of programs in Massachusetts to: reduce tobacco consumption by persuading users to quit; prevent the initiation of tobacco use among young people, and reduce their access to tobacco; and protect non-smokers by reducing exposure to environmental tobacco smoke. In August 1999, the Centers for Disease Control (CDC) of the U.S. Department of Health and Human services issued a report entitled *Best Practices for Comprehensive Tobacco Control Programs—August 1999*, which recognized Massachusetts, along with California, as the only two states in the nation that currently have programs implementing all of the CDC's recommendations for comprehensive state tobacco control. These programs include, but are not limited to, those described below in this affidavit. The document attached as Exhibit A to this affidavit is a true and accurate copy of the CDC report *Best Practices for Comprehensive Tobacco Control Programs—August 1999*. The document attached as Exhibit B to this affidavit is a true and accurate copy of the portion of the CDC report *State Tobacco Control Highlights—1999* that relates to Massachusetts.

5. The MTCP began a tobacco education media campaign in October, 1993. The mass media campaign uses television, radio, billboard, and print advertising to inform Massachusetts residents about the dangers of tobacco use. At times, the MTCP media campaign has carried advertisements specifically

targeted at youth. In addition to information on health risks, these advertisements presented messages to counter some of the beliefs that make tobacco use acceptable or desirable among young people. For example, one series of ads emphasized that young people can quickly become addicted to nicotine, while another countered the idea that smoking makes one socially attractive. The Massachusetts Tobacco Control Program media campaign budget was $16 million for fiscal year 1994, $14 million for fiscal year 1995, $13 million for fiscal year 1996, $11.70 million for fiscal year 1997, and $11.21 million for fiscal year 1998. The Massachusetts Tobacco Control Program media campaign budget is $11 million for fiscal year 1999.

6. The MTCP supports and funds a variety of community-based programs, particularly with local Boards of Health and local Health Departments. Some of the MTCP funding provides technical assistance and support for enactment and enforcement of local ordinances and regulations designed to make it harder for youth to buy tobacco products from retail establishments and vending machines, and to protect the public from environmental tobacco smoke. Boards of Health and Health Department Programs also provide important services to the general public such as smoking cessation services.

7. The population affected by local restrictions on youth access to tobacco has risen dramatically since the MTCP effort began. For example, 177 Massachusetts cities and towns, accounting for more than three-quarters of the population of the Commonwealth, now require merchants who sell tobacco products to be licensed. This represents a dramatic change over the lifetime of the MTCP, as less than 5 percent of the population was covered by such requirements in 1992. Local laws limiting free-standing "self-service" displays of tobacco products have been adopted almost as broadly in communities, representing more than two-thirds of Massachusetts residents. Also, as of June 1998, 87 towns have completely banned

vending machines, 75 require the use of "lockout" devices on vending machines, and 56 limit vending machines to locations that are not accessible to youth.

8. During the time period from January of 1994 to June of 1998, the efforts of the local Boards of Health and Health Departments, together with other local-MTCP-funded programs, to monitor and enforce youth access provisions included:

a. 46,568 checks of retail premises to make sure that they had appropriate signs indicating the prohibition on sales to minors;

b. 31,603 controlled buying attempts, in which youth under age 18 attempted to purchase cigarettes and reported on the results;

c. 7,561 checks of compliance with vending machine restrictions.

9. At the time of the start of the MTCP warnings were given out to merchants for most violations, and the citation rate in 1994 (which is the percentage of observed violations which result in a citation) was just 13%. By the first half of 1998, the citation rate had climbed to 53%.

10. From January of 1994 to June of 1998 illegal sales have resulted in a total of 1,910 citations and $139,325 in levied fines. In March-May of 1994, 48% of all attempts resulted in illegal sales of cigarettes. Since that time, retailer compliance has improved, and the violation rate was a statewide average of 19.3% in 1998 for both MTCP-funded and non-MTCP-funded communities, and under 10% in MTCP-funded communities in April-June of 1998.

11. In addition to the compliance checks performed by the local Boards of Health and Health Departments, the Massachusetts Tobacco Control Program carries out compliance checks as part of a project funded by the U.S. Food

and Drug Administration. These compliance checks were performed in communities across Massachusetts, even where there was no local tobacco control program. Over 5,000 compliance checks were carried out in 1998, and over 8,000 compliance checks have already been performed in 1999. The average non-compliance rate was 22.8% in 1998, and the average non-compliance rate for the first six months of 1999 is 29.7%.

12. The MTCP works together with the Massachusetts Department of Education to support comprehensive health education in public schools, including education on tobacco prevention and smoking cessation. The MTCP also creates and funds other educational initiatives. For example, a new MTCP initiative called "Smoke Screeners" teaches students to become more critical movie viewers by becoming more aware of how tobacco is used in Hollywood films and better able to see through the "smokescreen" glamorizing smoking. The Smoke Screeners program reached out to the high-risk 11-14 year olds in more than 1,000 middle schools and youth centers throughout Massachusetts.

13. Outside of the classroom, numerous MTCP activities inform youth of tobacco risks and involve them in positive peer efforts. Creative activities carried out by local programs are designed both to provide information and to engage youth in positive anti-smoking leadership activities. For example, members of MTCP-funded youth programs have sponsored or participated in over 3,200 community tobacco education and prevention events, such as public speaking engagements and recreational or cultural events. In Fiscal Year 1998 alone almost 900 events drew a total attendance of over 160,000 people.

14. The MTCP funds statewide support service programs that disseminate tobacco educational materials; raise public awareness of the health hazards associated with tobacco use and of tobacco industry activities that promote use;

educate local cities and towns about tobacco control legal and policy issues that may affect their residents; and provide easily accessible assistance to smokers and their families. These programs include a clearinghouse of educational materials, a smokers' quit counseling line, and training programs.

15. According to the Massachusetts Adult Tobacco Surveys, which were conducted under the direction and supervision of the MTCP, 63% of current adult smokers in Massachusetts started smoking before they were 18 years old, and only 12% began after age 21.

16. In 1998, the MTCP conducted a survey of the advertisements visible on more than 3,000 storefronts in Massachusetts in 125 cities and towns across the Commonwealth. The results of this statewide advertising survey were published in a report entitled "Operation Storefront." Operation Storefront found:

a. Tobacco advertising made up 52% of the more than 20,000 advertisements visible from outside retail establishments surveyed from February through April 1998;

b. The four brands which surveys by the CDC have shown are the most popular brands among youth (Marlboro, Newport, Camel, and Winston) (accounting for 93% of youth smoking), were the most heavily advertised brands visible on storefronts. These four brands accounted for more than two-thirds (68%) of all tobacco ads;

c. Stores within 1,000 feet of schools displayed more tobacco advertisements per vendor than stores farther away. The average number of tobacco advertisement was 5.49 for stores near schools, and 3.96 for other stores;

d. Stores in poorer communities and minority communities carry more cigarette advertising per store than those in more affluent and non-minority communities.

17. In or about 1991, I contacted The Tobacco Institute to request a copy of their voluntary advertising and promotion code. The document attached as Exhibit C to this affidavit is a true and accurate copy of the document I received from the Tobacco Institute, entitled "Cigarette Advertising and Promotion Code."

SIGNED AND SWORN UNDER THE PAINS AND PENALTIES OF PERJURY THIS ___ DAY OF OCTOBER, 1999.

/s/ Gregory N. Connolly
Gregory N. Connolly

Sworn before me this ___ day of October, 1999.

/s/ [illegible]
Notary Public

My Commission expires:

MY COMMISSION EXPIRES
JUNE 21, 2002

Exhibit "A"

Best Practices for Comprehensive
Tobacco Control Programs

CDC

U.S. Department of Health and Human Services
Centers for Disease Control and Prevention
National Center for Chronic Disease Prevention and Health
Promotion Office on Smoking and Health

* * * *

Efficacy of Comprehensive Tobacco Control Programs: California and Massachusetts

Evidence supporting the programmatic recommendations in this guidance document are of two types. Recommendations for chronic disease programs to reduce the burden of tobacco-related diseases, school programs, cessation programs, enforcement, and counter-marketing program elements are based primarily upon published evidence-based guidelines. Other program categories rely mainly upon the evidence of the efficacy of the large-scale and sustained efforts of two States (California and Massachusetts) that have been funding comprehensive tobacco prevention and control programs using State tobacco excise taxes. Increasing excise taxes on cigarettes reduces tobacco consumption rates. But more importantly, when the excise taxes support effective community, media, and school programs to prevent tobacco use, decreases in per capita consumption will continue even if industry lowers tobacco prices to preexcise tax values.

* * * *

Exhibit "C"

Cigarette Advertising and Promotion Code

The Tobacco Institute

Cigarette smoking is an adult custom. Children should not smoke. Laws prohibiting the sale of cigarettes to minors should be strictly enforced. The cigarette manufacturers advertise and promote their products only to adult smokers. They support the enactment and enforcement of state laws prohibiting the sale of cigarettes to persons under 18 years of age.

The cigarette manufacturers have adopted the following Code to emphasize their policy that smoking is solely for adults.

* * * *

Advertising

1. Cigarette advertising shall not appear—

   (a) in publications directed primarily to those under 21 years of age, including school, college or university media (such as athletic, theatrical or other programs), comic books or comic supplements; or

   (b) on billboards located within 500 feet of any elementary school, junior high school or high school or any children's playground.

2. No payment shall be made by any cigarette manufacturer or any agent thereof for the placement of any cigarette, cigarette package, or cigarette advertisement as a prop in any movie produced for viewing by the general public.

3. No one depicted in cigarette advertising shall be or appear to be under 25 years of age.

4. Cigarette advertising shall not suggest that smoking is essential to social prominence, distinction, success or sexual attraction, nor shall it picture a person smoking in an exaggerated manner.

5. Cigarette advertising may picture attractive, healthy looking persons provided there is no suggestion that their attractiveness and good health is due to cigarette smoking.

6. Cigarette advertising shall not depict as a smoker anyone who is or has been well known as an athlete, nor shall it show any smoker participating in, or obviously just having participated in, a physical activity requiring stamina or athletic conditioning beyond that of normal recreation.

7. No sports or celebrity testimonials shall be used or those of others who would have special appeal to persons under 21 years of age.

* * * *

Sampling

1. Persons who engage in sampling shall refuse to give a sample to any person whom they know to be under 21 years of age or who, without reasonable identification to the contrary, appears to be less than 21 years of age.

2. Sampling shall not be conducted in or on public streets, sidewalks or parks, except in places that are open only to persons to whom cigarettes lawfully may be sold.

3. Cigarette product samples shall not otherwise be distributed in any public place within two blocks of any centers of youth activities, such as playgrounds, schools, college campuses, or fraternity or sorority houses.

* * * *

Definitions

1. "Advertising" means all forms of advertising including vehicle decals, posters, pamphlets, matchbook covers and point of purchase materials in the United States, Puerto Rico, and U.S. territorial possessions.

2. "Sampling" means giving or distributing without charge packages of cigarettes in a public place for commercial advertising purposes ("cigarette samples"), but does not include isolated offerings of complimentary packages or the distribution of such packages ro wholesale or retail customers or to company shareholders or employees in the normal course of business.

[Dated October 15, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, as Attorney General, Defendant.	)	Civil Actions No. 99-11118-WGY (and consolidated cigarette cases)
UNITED STATES TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, as Attorney General, Defendant.	)	Civil Action No. 99-CV-11135-WGY
CONSOLIDATED CIGAR CORP., et al., Plaintiffs v. THOMAS REILLY, as Attorney General, Defendant.	)	Civil Action No. 99-CV-11270-WGY

ATTORNEY GENERAL'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED PURSUANT TO LOCAL RULE 56.1

* * * *

15. In January 1999, the Attorney General promulgated regulations pursuant to M.G.L. c. 93A, §2 (c) to proscribe certain unfair and deceptive acts and practices that promote the illegal sale of tobacco products to persons under 18 years of age. 940 Code Mass. Reg. § 21.00, *et seq.* and 940 Code Mass. Reg. § 22.00, *et seq.* (Copies attached). The Attorney General's regulations were originally proposed, and published in the Massachusetts Register, on May 1, 1998. Public hearings were held in Boston on May 20, 1998 and in Springfield on May 21, 1998, eliciting testimony supporting and opposing the regulations from 41 individuals and organizations. In addition, approximately 100 written comments on the proposed regulations were submitted to the Attorney General by various individuals and organizations. Affidavit of Michael G. Hering ("Hering Aff.") ¶ 94.

Support for the Attorney General's Regulations

16. In 1994, the United States Surgeon General published a report entitled Preventing Tobacco Use Among Young People: A Report of the Surgeon General. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1994. ("1994 Surgeon General Report"). That report included a chapter, at pages 157-203, which reviewed evidence relating cigarette advertising to youth smoking initiation and stated: "Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of

smoking, cigarette advertising appears to increase young people's risk of smoking." Hering Aff., Ex. 1, p. 195.

17. The 1994 Surgeon General's Report found that among all persons who had ever been daily smokers, 81.9% first tried a cigarette before age 18. Hering Aff., Ex. 1, p. 65.

18. In 1995, the Food and Drug Administration ("FDA") performed a rulemaking analysis of the evidence relating cigarette and smokeless tobacco advertising to youth smoking initiation and youth use of smokeless tobacco and issued a proposed rule: *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, Proposed Rule*. Food and Drug Administration. 60 Fed. Reg. 41,313 (1995) ("FDA Proposed Rule"). The FDA comentary that accompanied the Proposed Rule cites and discusses a large number of scientific studies and other evidence on this issue. After this review, the FDA states: "The agency concludes that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: 1) A causal relationship between advertising and youth smoking behavior, and 2) a positive effect of stringent advertising measures on smoking rates and on youth smoking. . . . Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption. Therefore, the agency finds that stringent restrictions on advertising are essential if smoking by adolescents is to be reduced." Hering Aff., Ex. 2, p. 41334.

19. The FDA received voluminous comments on the Proposed Rule from interested parties, including from the cigarette and smokeless tobacco manufacturers and/or their agents. The FDA then analyzed and discussed many of these comments in its Final Rule. 61 Fed. Reg. p. 44474-44495. The FDA concluded: "FDA's review and consideration of the comments received has led the agency to conclude that

advertising plays a material role in the decision by those under 18 to use tobacco products." Hering Aff., Ex. 3, p. 44466.

20. In 1994, the National Academy of Science's Institute of Medicine issued a report entitled Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths that reviewed the evidence relating cigarette advertising to youth smoking initiation. p. 105-139. The report stated: "Tobacco advertising is characterized by images and themes that are especially appealing to adolescents, and some are appealing to children. In addition, a large proportion of promotional expenditures associate use of tobacco with activities and products that are attractive to children and youths. The sheer amount of expenditures for advertising and promotion assures that young people will be exposed to these messages on a massive scale." The report also states, "The images typically associated with advertising and promotion convey the message that tobacco use is a desirable, socially approved, safe and healthful, and widely practiced behavior among young adults, whom children and youths want to emulate. As a result, tobacco advertising and promotion undoubtedly contribute to the multiple convergent pyschosocial influences that lead children and youths to begin using these products and to become addicted to them." Hering Aff., Ex. 4, p. 130 - 31.

21. A review study entitled "How Many Adolescents Start Smoking Each Day in the United States?" by Gilpin, Elizabeth A., et al., was published in the Journal of Adolescent Health 1999;25:248-255. The study found that nationwide 4,824 adolescents first experiment with cigarettes every day. Adolescent is defined as between 11 and 17 years old. The study also found that 1,975 under-age U.S. adolescents become regular smokers each day. The study cross-references data from the 1989 and 1993 Teenage Attitudes and Practices Surveys (TAPS) of 16,954 individuals with the 1992 and 1993

Current Population Surveys (CPS) of 82,279 individuals. Hering Aff., Ex. 93.

Outdoor Tobacco Advertising in Massachusetts

22. A study entitled "Outdoor Tobacco Advertising in Six Boston Neighborhoods. Evaluating Youth Exposure" by Pucci, et. al., was published in the *American Journal of Preventive Medicine*, 1998, 15(2). The study examined the prevalence, type and proximity to public schools of all stationary outdoor tobacco advertising in six Boston neighborhoods. The study found that "youth in the six neighborhoods are heavily exposed to stationary, outdoor cigarette advertising. This exposure is intense in areas close to public schools, and more intense in neighborhoods with more children, with significant Black and Hispanic/Latino populations, and with low socioeconomic status. . . . 32% of the advertising units [at retail establishments] were less than 3.5 feet from the ground or at children's eye level." Hering Aff., Ex. 57.

23. A study entitled "Massachusetts Operation Storefront-1998" by the Massachusetts Department of Public Health, Massachusetts Tobacco Control Program was issue din 1998. The study surveyed more than 3000 retail outlets in 125 cities and towns in Massachusetts. The study found:

a. "Tobacco advertisements made up 52% of the more than 20,000 advertisements visible to youth from outside retail establishments surveyed..."

b. "Brands smoked by youth (Marlboro, Camel, Newport, Winston) were also the most heavily advertised brands, accounting for more than two-thirds of all tobacco ads."

c. "Storefronts located within 1000 feet of a school were more likely to display more tobacco advertisements per retail vendor, and displayed more ads per vendor, than storefronts located farther away from schools. Fifty-two percent of retail

ads near schools were for tobacco, while only 48% percent away from schools were tobacco ads."

d. "The average number of tobacco advertisements was 5.49 for stores near schools, and only 3.96 for other stores -- exposing children to nearly one and a half times more tobacco displays during their daily activities." Hering Aff., Ex. 58; Affidavit of Greg Connolly ("Connolly Aff.") at. ¶ 16.

24. The voluntary advertising code published by the cigarette industry's trade group in 1990 prohibits cigarette advertising on billboards located within 500 feet of schools or playgrounds. Cigarette Advertising and Promotion Code, The Tobacco Institute, December, 1990. Connolly Aff., Ex. C.

Historical Studies

25. Historical studies have analyzed variations in the kind and amount of cigarette advertising in the past and compared these advertising variations with changes in smoking initiation among youths. Some of these studies examined specific cigarette marketing campaigns and concluded that they were associated with increased smoking behavior among young people including minors. Hering Aff., Ex. 5 - 9.

26. A study entitled "Trends in Adolescent Smoking Initiation in the United States: Is Tobacco Marketing an Influence?" by Gilpin, E., and Pierce, J., was published in *Tobacco Control*. 6(2):122-127 (1997). The study analyzes survey and other data, and states: *"Results*--From 1979 to 1984, adolescent [smoking] initiation rates decreased, but increased thereafter... Cigarette price increased throughout the decade as did tobacco marketing expenditures, especially for coupons, value-added items, and promotional allowances. *Conclusion*– Availability of cheaper cigarettes is not likely to be a cause of increased smoking initiation by adolescents. Although other influences cannot be ruled out, we suspect that the expanded tobacco marketing budget, with its increased emphasis on tactics that may be particularly pertinent to young

people, affected adolescent initiation rates." Hering Aff., Ex. 5, p.122.

27. A study entitled "A Historical Analysis of Tobacco Marketing and the Uptake of Smoking by Youth in the United States: 1890-1977" by Pierce, J., and Gilpin, E., was published in *Health Psychology*. 14(6): 500-508 (1995). The study reports the results of a series of surveys and other data, stating: "Our initiation rate trend (slope) analysis clearly show that marked increases in the rate of smoking uptake in the particular gender group targeted by these [advertising] campaigns were coincident with the beginning of each. Such an effect was not observed among the nontargeted gender" p.5. [Following a historical analysis culminating in the period ending in 1977] "Thus, it would appear that the effectiveness of tobacco marketing practices in encouraging nonsmokers to start smoking may now be limited to the adolescent population." Hering Aff., Ex. 6, p.8..

28. A study entitled "Trends in smoking initiation among adolescents and young adults -- United States, 1980-1989" by Cummings KM, Shah D, Shopland DR was published in the Centers for Disease Control, Morbidity and Mortality Weekly Report, 1995; 44:521-5. The study reports the results of survey data stating: "Among adolescents [age 14-17], the smoking initiation rate decreased slightly from 1980 (5.4%) through 1984 (4.7%) and then increased through 1989 (5.5%)... In comparison, among young adults, initiation rates declined throughout the 1980s." "The increase in rates of smoking initiation among adolescents during 1985-1989 may reflect increased real expenditures for cigarette advertising and promotion. The increase in rates occurred during a period when real expenditures for total cigarette advertising and promotion doubled, and expenditures for cigarette promotion more than quadrupled." Hering Aff., Ex. 7.

29. A study entitled "Smoking Initiation by Adolescent Girls: 1944 Through 1988: An Association With Targeted

Advertising" by Pierce, J., Lee, L., and Gilpin, E., was published in the *Journal of the American Medical Association*. 271(8): 608-611 (1994). The study reports the results of analysis of the National Health Interview Surveys and other data, stating: "Results.--In 18 to 20-year-old women, [smoking] initiation rates peaked in the early 1960s and steadily declined thereafter. In girls younger than 18 years, smoking initiation increased abruptly around 1967, when tobacco advertising aimed at selling specific brands to women was introduced...Conclusions.--The tobacco advertising campaigns targeting women, which were launched in 1967, were associated with a major increase in smoking uptake that was specific to females younger than the legal age for purchasing cigarettes." Hering Aff., Ex. 8, p. 608.

30. An article entitled "Changes in the Cigarette Brand Preferences of Adolescent Smokers--United States, 1989-1993" was published in the Centers for Disease Control, Morbidity and Mortality Weekly Report 43(32): 577-604 (19 August 1994). The article compared the results of surveys in 1989 and 1993, stating: In 1993 among adolescents aged 12-18 years, "Marlboro, Camel, and Newport were the most frequently purchased brands." p.577-79. The brand preference for Camel brand cigarette among adolescents rose from 8.1% in 1989 to 13.3% in 1993. At the same time the overall market share for Camel brand cigarettes was 3.9% in 1989 and remained at 3.9% in 1993. [The old Joe cartoon character advertising campaign for Camels began in 1988]. Hering Aff., Ex. 9, Table 2.

Studies Regarding Brand Specific Cigarette Advertising and Youth Cigarette Brand Behavior

31. A series of studies have found a correlation between the intensity of brand-specific cigarette advertising and 1) cigarette brand awareness among young children or youth; and/or 2) cigarette brand preference among youth who do not

smoke; and/or 3) cigarette brand market shares among youth who smoke. Hering Aff., Ex. 10 - 20, 40.

32. A study entitled "The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults, 1979-1993" by Pollay, Richard W., et al. was published in the *Journal of Marketing*. 60(2):1 - (1996). The study analyzed cigarette brand market share data and cigarette brand advertising expenditure data over a twenty year period. The study stated: "Because brand shares of advertising voice [expenditures] are significantly related to subsequently realized market shares, cigarette advertising appears to influence the smoking behavior of adolescents. This finding is robust to various assumptions regarding the carryover of advertising effects from period to period and accounting for the possibility that the behavior of adolescents is an imitation of adults who have been influenced by advertising. Notably, the effect is substantially larger among adolescents than among adults by a factor of about three. The battle of the brands for market share is waged largely among the young, for it is a brand's success among the young that leads to greater brand sales and profit in the long term." Hering Aff., Ex. 10.

33. A study entitled "Exposure to Brand-Specific Cigarette Advertising in Magazines and its Impact on Youth Smoking," by Pucci, Linda G. et al., will be published in *Preventive Medicine*. The study conducted "[a] longitudinal youth survey...to assess baseline exposure to brand-specific cigarette advertising in magazines and to measure subsequent smoking behavior. The sample comprised of 1,069 Massachusetts youths, ages 12-15 years at baseline in 1993, and 627 of these youths who were interviewed after four years." The study concluded that [b]y documenting a relationship between brand-specific magazine advertising exposure and brand of smoking initiation among new smokers, this study provides strong new evidence that cigarette advertising influences youth smoking." Hering Aff. Ex. 40.

34. A study entitled "*Adolescents' responses to cigarette advertisements: links between exposure, liking, and the appeal of smoking*," by Arnett, J. was published in *Tobacco Control* 1998; 7:129-133. The study reported the results of a survey of 534 adolescents in grades 6-12 (ages 11-18) from seven schools in four states which examined adolescents' responses to cigarette advertisements for different brands The study concluded that "[t]he advertisements most popular among adolescents are for two of the brands they are most likely to smoke--Marlboro and Camel. The results of the study are consistant with the view that certain cigarette advertisements enhance the appeal of smoking to many adolescents." Hering Aff., Ex. 11.

35. A study entitled "Cigarette Advertising and Children's Smoking: Why Reg was Withdrawn" by Hasings, G.B., et al. was published in the *British Medical Journal*. 309: 933-937 (1994). The study reported the results of a survey of British children and adults. The study concluded that the "[advertising campaign for a British cigarette brand Regal] was getting through to children more effectively than it was to adults and held the most appeal for teenagers, particularly 14-15 year old smokers." Hering Aff., Ex. 12, p. 933

36. A study entitled "Does Tobacco Advertising Target Young People to Start Smoking?: Evidence From California" by Pierce, John P., et al. was published in the *Journal of the American Medical Association*. 266(22):3154-3158 (1991). The study reported the results of telephone surveys of 24,296 adults and 5,040 teenagers. The study stated: "Perception of [cigarette] advertising is higher among young smokers; market-share patterns across age and sex groups follow the perceived advertising patterns; and changes in market share resulting from advertising occur mainly in younger smokers. Cigarette advertising encourages youth to smoke..." Hering Aff., Ex. 13.

37. A study entitled "*Brand Logo Recognition by Children Aged 3 to 6 Years*," by Fischer, P. et al., was published in the Journal of the American Medical Association, December 11, 1991, vol 266, No. 22. The study reported the results of a survey of 229 children aged 3 to 6 years, attending preschool, which examined product logo recognition. The study found that "[t]he recognition rates of The Disney Channel logo [i.e. Micky Mouse] and Old Joe (the cartoon character promoting Camel cigarettes) were highest in their respective product categories. Recognition rates increased with age. Approximately 30% of 3-year old children correctly matched Old Joe with a picture of a cigarette compared with 91.3% of 6-year-old children." The study concluded that "[v]ery young children see, understand and remember advertising." Hering Aff., Ex. 14.

38. A study entitled "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children" by DiFranza, Joseph R., et al., was published in the *Journal of the American Medical Association*. 266(22):3149-3153 (1991). The study reported the results of surveys of high school students and adults. The study investigated recognition of Camel's Old Joe cartoon character, product and brand name recall in masked advertising samples, brand preference, and appeal of advertising themes. In comparing high school students grades 9 - 12, to adults age 21 years or older, the study stated: "Children were more likely to report prior exposure to [R.J. Reynolds' Camel brand] Old Joe cartoon character (97.7% vs 72.2%...). Children were better able to identify the type of product being advertising (97.5% vs 67.0%...) and the Camel cigarette brand name (93.6% vs 57.5%...). Children also found the Camel cigarette advertisements more appealing...This confirms that Old Joe cartoon character advertisements are more effective at communicating product and brand name information to children than to adults." "Our data demonstrate that in just 3 years [since the start of the advertising campaign in 1988] Camel's Old Joe cartoon

character had an astounding influence on children's smoking behavior. The proportion of smokers under 18 years of age who choose Camels has risen from 0.5% to 32.8%." Hering Aff., Ex. 15. p. 3151.

39. A study entitled "Reinforcing Effects of Cigarette Advertising on Under-age Smoking" by Aitken, P.P. and D.R. Eadie was published in the *British Journal of Addiction*. 85: 399-412 (1990). The study reported the results of interviews with 848 Glasgow children aged between 11 and 14 years. The study stated: "There were consistent differences between smokers and non-smokers. Smokers tended to be more adept at recalling, recognizing and identifying cigarette advertisements. This suggests that they pay more attention to cigarette advertising. Smokers also tended to be more appreciative of cigarette advertising. Moreover, this greater awareness and appreciation of cigarette advertising was independent of other important predictors of under-age smoking, such as smoking by peers, siblings and parents. These findings, taken in conjunction with previous research, indicate that cigarette advertising is reinforcing under-age smoking." Hering Aff., Ex. 16, p. 399.

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42. A study entitled "Brand preferences among children who smoke" by McNeill AD, Jarvis JM, West RJ was published in the British Medical Journal *Lancet*. 1985;2:271-2. The study reported the results of a survey in England. It found that among students age 11 - 16 years, 91% of those that smoke had a brand preference, and 80% preferred the most heavily advertised brand, Benson & Hedges. The study stated "It would be surprising if it were by chance alone that the most heavily promoted cigarette brand in Britain was also the brand most preferred by children." Hering Aff., Ex. 19, p.272.

43. A study entitled "Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications

for Health Promotion" by Chapman, Simon and Fitzgerald, was published in the *American Journal of Public Health*. 72(5):491-494 (1982). The study stated: "A survey on brand preference and cigarette advertising recall in 1,195 school children was conducted in Sydney, Australia. Four of the 130 available brands accounted for the cigarettes smoked by 78.7 per cent of smokers. Smokers were nearly twice as likely to correctly identify edited [masked] cigarette advertisements and slogans than were non-smokers." Hering Aff., Ex. 20, p. 491.

Studies Regarding Youth Exposure to Cigarette Advertising (all brands) and Youth Smoking Behavior

44. A large number of cross-sectional studies find a correlation between youth exposure to cigarette advertising (and promotion) and increased youth smoking or steps towards smoking. These studies find associations between exposure to, or participation in, cigarette advertising and promotional activities, and positive attitudes toward smoking, susceptibility to smoking, smoking experimentation, and regular smoking among youths. The relationships found in these studies persisted even when other factors which have been shown to predict smoking initiation were controlled for (such as family and peer influence). Hering Aff., Ex. 21 - 29, 32 - 38, 55 - 59, 90.

45. A study entitled "Effects of Sales Promotion on Smoking among U.S. Ninth Graders," by Redmond, W., was published in *Preventive Medicine* 28:243-250 (1999). The study reported the results of analysis of annual surveys of high school seniors from 1978 through 1995 (total of 94,652 participants) and data on smoking initiation rates and cigarette marketing expenditures. The study "examine[d] the association between tobacco marketing efforts and daily cigarette smoking by adolescents." The study concluded that "[p]rior research has established that cigarette sales promotions are attractive to adolescents and that receptivity to promotional items by adolescents is associated with progression toward smoking

behavior. The present research establishes a linkage between cigarette promotions and escalated levels of smoking behavior among adolescents. Significantly greater numbers of ninth graders initiate daily smoking in years of high promotional expenditures than would otherwise be expected." Hering Aff., Ex. 21.

* * * *

47. A study entitled "Tobacco advertisements: one of the strongest risk factors for smoking in Hong King students" by Lam TH, Chung SF, Betson CL, Wong CM, Hedley AJ. was published in the *American Journal of Preventive Medicine* 1998; 14:217-23. The study of 6,304 randomly selected secondary school students in Honk Kong found that "In a backward stepwise logistical regression model, ever-smoking was independently associated with thirteen factors...Among the strongest associations observed was the youth's perception of cigarette advertisements as attractive." Hering Aff., Ex. 23

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49. A study entitled "Cigarette Promotional Items in Public Schools" by Sargent, James D. et al. was published in the *Arch. Pediatr. Adolesc. Med.* 151: 1189-1196 (1997). The study reported the results of a survey of 1265 sixth through twelfth graders in Vermont. The study found that one-third of the students surveyed owned a cigarette promotional item. The study stated: "After controlling for confounding factors, such as having friends who smoke, students who owned [cigarette promotional items] were 4.1 times more likely to be smokers than those who did not own." Hering Aff., Ex. 25, p.1189.

50. A study entitled "Tobacco Promotion and Susceptibility to Tobacco Use Among Adolescents Aged 12 through 17 Years in a Nationally Representative Sample" by Altman, David G., et al., was published in the *American Journal of Public Health*. 86:1590-1593 (1996). The study

reported the results of a survey of 1047 adolescents 12 - 17 years old and also from a survey of young adults 18 - 24 years old. The study found: "Our data provide evidence that experience with tobacco promotion, as measured by awareness, knowledge of others owning items, and firsthand experience with promotions, is strongly associated with susceptibility to tobacco use. This finding is important because there is evidence of a dose-response relationship between the susceptibility index and subsequent tobacco use and other evidence that youth are highly involved in tobacco promotion campaigns." Hering Aff., Ex. 26.

51. A study entitled "Seventh Graders' Self-Reported Exposure to Cigarette Marketing and Its Relationship to Their Smoking Behavior" by Schooler, C., Feighery, E., and Flora, J., was published in the *American Journal of Public Health*. 86(9): 1216-1221 (1996). The study reported the results of a survey of 571 seventh graders. The study stated: "Eighty-eight percent of these 13-year olds reported exposure to cigarette marketing: the majority often saw ads in magazines, on billboards, and at stores and events, and one quarter owned cigarette promotional items. After social influences to smoke were controlled for, exposure to cigarette marketing was related to self-reported smoking behavior. Likelihood of experimenting with smoking was 2.2 times greater among those who owned promotional items and 2.8 times greater among those who had received mail from a tobacco company. Seeing cigarette advertisements in magazines increased the likelihood by 21% and seeing tobacco marketing in stores increased it by 38%." "Conclusions. Youth are daily and widely exposed to tobacco industry marketing efforts; this exposure is related to smoking behavior." Hering Aff., Ex. 27, p. 1216.

52. A study entitled "Recognition and Liking of Tobacco and Alcohol Advertisements Among Adolescents: Relationships with Susceptibility to Substance Abuse" by

Unger, Jennifer B., C. Anderson Johnson, and Louise A. Rohrbach was published in *Preventive Medicine*. 24(5): 461-466 (1995). The study divided eighth-grade students into groups based on their smoking status. The students were then asked to view masked cigarette advertisements. The study reported: "The results of this study indicated that susceptible nonsmoking adolescents are similar to current cigarette smokers in their reactions to cigarette advertisements. Cigarette advertisements appealed just as much to susceptible nonsmoking youth as to smokers... One interpretation of these findings is that cigarette advertisements ostensibly aimed at encouraging current smokers to switch brands rather than recruiting new smokers are in fact attracting susceptible nonsmokers as well as current smokers." Hering Aff., Ex. 28, p. 465.

53. A study entitled "Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking" Evans, Nicola, et al. was published in the *Journal of the National Cancer Institute*. 87(20): 1538-1545 (1995). The study reported the results of a survey of 3,536 adolescents [12-17 years old] who had never smoked. The study found: "Receptivity to tobacco advertising and exposure to smokers were independently associated with susceptibility to smoking, but the relationship appeared stronger for receptivity to advertising. Adolescents exposed to family members and peers...who smoked were 1.89 (95% confidence interval...) times as likely to be susceptible [to smoking], whereas adolescents who scored 4 or more on the Index of Receptivity to Tobacco Marketing [recognition of cigarette advertising messages, having a favorite cigarette advertisement, owning or willingness to use a promotional item, and other factors] were 3.91...times as likely to be susceptible [to smoking] as those who scored 0. Even adolescents who scored 2...were 2.03 times as likely to be susceptible...Conclusion: Our results support the hypothesis that tobacco marketing may be a stronger current influence in encouraging adolescents to initiate

the smoking uptake process than exposure to peer or family smokers or sociodemographic variables including perceived school performance." Hering Aff., Ex. 29, p. 1538.

54. A study entitled "Smoking Behavior of Adolescents Exposed to Cigarette Advertising" by Botvin, Gilbert J., et al. was published in *Public Health Reports*. 108(2) 217-224 (1993). The study reported the results of a survey of 602 adolescents which assessed the children's exposure to cigarette advertising and provided measures of their smoking behavior, demographic characteristics and some psychosocial variables. The study stated: "[e]xposure to cigarette advertising was found to be correlated with several measures of adolescent smoking behavior and it was found to be an important concurrent predictor of current smoking and intention to smoke in the future." Hering Aff., Ex. 32.

55. A Report entitled "Teen-age attitudes and behavior concerning tobacco" by the George H. Gallup International Institute was issued in 1992. The report presents the findings of a nationwide telephone survey of 1,125 teen-agers. The report states: "Tobacco advertising clearly is reaching teen-agers. Half could identify by sponsor at least one of four tested slogans. 87 percent of the teens interviewed could recall one or more tobacco company's advertising they had recently seen." Hering Aff., Ex. 33.

56. A study entitled "Cigarette Advertising and Adolescent Experimentation with Smoking" by Klitzner, Michael, Paul J. Gruenewald, and Elizabeth Bamberger was published in the *British Journal of Addiction*. 86: 287-298 (1991). The study reported the results of a survey of 295 United States 5th through 12th graders which examined relationships between cigarette advertising and smoking experimentation using environmental and psychological measures of advertising exposure. The study stated: "it was demonstrated that adolescents who experimented with cigarettes were better able to recognize advertised products

than those who had not, a selective exposure effect. Conversely, subjects who were better at recognizing advertised brands were more likely to have experimented with cigarettes, an effect due to their exposure to cigarette advertising." Hering Aff., Ex. 34.

57. A study entitled "Children's Awareness of Cigarette Advertisements and Brand Imagery" by Aitken, P.P., et al. was published in the *British Journal of Addiction*. 82: 615-622 (1987). The study reported the results of interviews of 726 Glasgow children aged between 6 and 17. The study states: "Their responses to questions about a set of cigarette advertisements indicate that the majority of primary school children are well aware of cigarette advertising; and many can correctly identify cigarette brands in 'puzzle' advertisements which do not show brand names." "Among the secondary school children, proportionally more smokers than non-smokers said they had seen the advertisements; and proportionally more smokers identified the puzzle advertisements. These findings suggest that cigarette advertising is getting through to young people and to under-age smokers in particular." Hering Aff., Ex. 35

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59. A study entitled "Children's advertisement-awareness related to their views on smoking" by Charlton A., was published in the *Health Education Journal* 1986;45:75-8. The study reported the results of a survey of 849 children aged nine and ten years, and 1,132 children aged 12 and 13 years. The study found: "67 per cent of the younger group and 84 per cent of the older group could name at least one cigarette brand. Seventeen per cent of the younger and 23 per cent of the older group named a favorite cigarette advertisement...Those children who named a favorite advertisement showed significantly greater support for supposed positive values of smoking such as looking tough, looking grown-up, calming nerves, giving confidence and controlling weight. This

difference in opinion applied equally to smokers and 'never smokers' in both age groups." Hering Aff., Ex. 36, p. 75.

60. A study entitled "Adolescent smoking and opinion of cigarette advertisements" by Potts H, Gillies P, Herbert M., was published in *Health Education Research* 1986; 1:195-201. The study reported the results of a survey of 258, 15-16 year olds, which asked the students about their smoking behavior and opinion of cigarette advertisements. The study stated: "More regular smokers than non-smokers held the view that the cigarette advertisements used in this study were exciting, interesting, eye-catching, glamorous and witty. A favorable opinion of advertisements was found to be significantly associated with adolescents' smoking. These findings provide some evidence to support the suggestion that cigarette advertisements may maintain smoking in adolescents by reinforcing a favorable attitude towards smoking" Hering Aff., Ex. 37.

61. A study entitled "Cigarette Smoking and Drug Use in Schoolchildren: II. Factors Associated with Smoking" by O'Connell, D.L., et al., was published in the *International Journal of Epidemiology*. 10:223-231 (1981). The study reported the results of a 1979 survey of over 6000 children aged 10-12 years which assessed the prevalence of smoking in children and identified "some of the social and personal factors associated with this phenomenon." The study stated: Although "friends" smoking behavior was the best predictor of a child's smoking status, it was followed by "approval of advertising." The study concluded that "intervention in the field of cigarette advertising may be the most direct and effective means of reducing prevalence of smoking in children." Hering Aff., Ex. 38.

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64. Richard W. Pollay, Professor of Marketing, University of British Columbia (UBC) and Curator of the

History of the Advertising Archives including the Tobacco Industry Promotion Series (TIPS) submitted a paper entitled "Protecting Children as Consumers: Comments on Proposed Regulations re: packaging, marketing, distribution and sales of cigarettes, etc." in support of the Attorney General's proposed regulations. Professor Pollay concluded that "[r]educing the frequency and/or likelihood of the exposure of minor to cigarette promotions, particularly by measures restricting outdoor and point-of-sale advertising proximal to schools and routes students travel and measures restricting "free gifts" and other promotional inducements such as coupon redemptions will reduce the creation of "friendly familiarity" and other favorable perceptions of children toward cigarette brands and cigarettes as a product class. In my opinion, it is also constructive to reduce the ease and likelihood of access of children to cigarettes and tobacco products by limiting sampling activities sales of "singles," vending machines and other self-service displays." Hering Aff., Ex 59.

Longitudinal Studies Regarding Youth Exposure to Tobacco Advertising and Youth Smoking Behavior

65. Several longitudinal studies have concluded that nonsmoking youths who either approved of cigarette advertising or reported that cigarette advertisements made smoking appear attractive to them were significantly more likely to start smoking than youths who had more negative responses to cigarette advertising at baseline. Other longitudinal studies have found that youths who are responsive to cigarette advertising or participate in tobacco promotions are more likely to experiment with smoking or to progress to established smoking. Hering Aff., Ex. 39, 41 - 44.

66. A study entitled "Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference," by Biener, Lois et al., will be published in the *American Journal of Public Health*. The study reports the results of a survey of 529 nonsmoking adolescents who were interviewed

by telephone in 1993 and again in 1997. The study concludes that "[p]articipation in tobacco marketing often precedes, and is likely to facilitate progression to established smoking among adolescents. Hence, restrictions on tobacco marketing and promotion could result in reducing addiction to tobacco." Hering Aff. Ex. 39.

67. A study entitled "Tobacco Industry Promotion of Cigarettes and Adolescent Smoking" by Pierce, John P., et al., was published in the *Journal of the American Medical Association*. 279(7): 511-515 (1998). The study reported the results of an initial survey of adolescents in 1993 and follow up survey in 1996. The study reinterviewed 1,752 adolescents in 1996 who had been categorized as "never smokers who were not susceptible to smoking" when first interviewed in 1993 to evaluate the association between receptivity to tobacco advertising and promotional activities and progress in the smoking uptake process. The study states: "While having a favorite advertisement in 1993 predicted which adolescents would progress [in the smoking uptake process] by 1996, possession or willingness to use a promotional item was even more strongly associated with future progression. From these data, we estimate that 34% of all experimentation in California between 1993 and 1996 can be attributed to tobacco promotional activities. Nationally, this would be over 700,000 adolescents each year." Hering Aff., Ex. 41.

68. A study entitled "Predisposing Effects of Cigarette Advertising on Children's Intention to Smoke When Older" by Aitken, P.P., edt al., was published in the *British Journal of Addiction*. 86:383-390 (1991). The study reported the results of a survey of 640 Glasgow children, initially aged between 11 and 14 years, who were interviewed twice, with approximately one year between interviews. The study stated: "Children whose intentions to smoke when older became more positive between the two interviews tended to be more aware of cigarette advertising at the time of the first interview

(compared with children whose intentions to smoke were negative at both interviews). Children whose intentions to smoke became more negative between the interviews tended to be less appreciative of cigarette advertisements at the time of the first interview (compared with children whose intentions to smoke were positive at both interviews). Since both groups differed from their respective contrast groups before their declared intentions changed, these findings support the view that cigarette advertising has predisposing as well as reinforcing effects on children's attitudes and behaviour with respect to smoking." Hering Aff., Ex. 42, p. 383.

69. A study entitled "Influence of education and advertising on the uptake of smoking by children" by Armstrong BK, deKlerk NH, Shean RE, Dunn DA, and Dolin PJ was published in the *Medical Journal of Australia* 1990;152: 117-24. The study reported the results of an initial survey of 2366 Australian students in their 7th year of school (average age 12) with two years of follow-up surveys. The study states: "[t]he children's perceived responses to cigarette advertising showed the strongest and most consistent evidence of an effect on the uptake of smoking by children who initially were non-smokers." Hering Aff., Ex. 43.

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Studies Regarding Cigarette Advertising Restrictions in Other Countries

71. Studies of smoking rates in countries with and without significant cigarette advertising restrictions have generally found small, but significant reductions in both overall smoking rates, and in youth smoking rates, following these advertising restrictions. Hering Aff., Ex. 3, 45 - 46, 89.

72. A review study entitled "Tobacco Advertising: Economic Theory and International evidence" by Saffer, Henry et al., was published in *NBER Working Paper Series*. The paper analyzed 31 studies that looked at the effects of

advertising on cigarette consumption, conducted between 1925 and 1990. The authors concluded that "[t]he primary conclusion of this research is that tobacco advertising increases tobacco consumption." Hering Aff., Ex. 89.

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74. A report entitled "Health or Tobacco--An End to Tobacco Advertising and Promotion," by the Toxic Substances Board, Wellington, New Zealand was issued in May 1989. The report reviewed the effect of advertising restrictions in 33 countries and concluded that there was a correlation between the degree of restrictions imposed in each country and decline in tobacco use. The report stated: "When countries were grouped according to the degree of governmental restriction of tobacco promotion, the greater the degree of restriction, the greater the average annual fall in tobacco consumption. This was also true for the rate of decrease in the percentage of adults and young people who smoke." Hering Aff., Ex. 46, p. 64.

75. The FDA analyzed the academic research on the effect of restrictions on tobacco advertising in other countries. Proposed Rule, Fed. Reg. 41333-34; FDA Final Rule, Fed. Reg. 44490-44493. The FDA then stated: "Based on the foregoing, FDA finds that the international experience provides empirical evidence that restrictions on tobacco advertising, when given appropriate scope and when fully implemented, will reduce cigarette and smokeless tobacco use among children and adolescents under the age of 18." FDA Final Rule, Fed. Reg. 44493. Hering Aff., Ex. 3.

Pervasiveness of Tobacco Advertising and Adolescent Themes.

76. A review article entitled "Time to Up the Ante in the War on Smoking" by Bonnie, R.J., and B.S. Lynch was published in *Issues in Science and Technology*. 11:33-37 (1994). The article states: "[t]he ubiquitous display of messages promoting tobacco use clearly fosters an environment

in which experimentation by youth is expected if not explicitly encouraged." Hering Aff., Ex. 47, p. 34.

77. In its commentary to the Proposed Rule, the FDA quotes a former Marlboro marketer who describes the effect of Marlboro marketing as creating "friendly familiarity." Leo Burnett, cited in FDA Proposed Rule at p. 41329, fn 104. Hering Aff., Ex. 2.

78. The Federal Trade Commission Report to Congress for 1997, Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1337, issued in 1999, states that in 1997 the cigarette industry spent a total of $5.66 billion on advertising and promotion. The report states that this was a 10.8% increase from 1996 and compares to $361 million spent in 1970. Spending has increased annually since 1987, except for a $1.2 Billion decrease from 1993 to 1994. In 1997 the cigarette industry spent $305.4 million on point of sale advertising, a significant increase from $252.6 million in 1996. Outdoor advertising increased from $292.3 million to $295.3 million in the same period. Hering Aff., Ex. 65.

79. At study entitled "Is the Smoking Decision an 'Informed Choice'?" by Leventhal, Glynn and Fleming was published in the *Journal of the American Medical Association*, 257 (June 26, 1987) 3373-76. The study reports the result of a survey of students in grades 2-12. The study states: "The respondents greatly overestimated the prevalence of adult and peer smoking, negative attitudes of their peers were greatly underestimated. . . ." Hering Aff., Ex. 49.

80. A study entitled "Predicting the Onset of Cigarette Smoking in Adolescents: A Longitudinal Study" by Chassin, L., et al. was published in the *Journal of Applied Social Psychology*. 14:224-243 (1984). The study reports the results of surveys of 6-11th graders, and of a follow up survey one year later. The study found that the degree of youth overestimation of smoking prevalence among adults and

teenagers is one of the strongest predictors of smoking initiation. Hering Aff., Ex. 48.

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82. A study entitled "Cigarette Brand Preferences Among Adolescents," by Johnston, Lloyd D. et al., was published *Monitoring the Future Occasional Paper 45*. The study analyzed "brand preference" among "2,048 eigth graders, 2,708 tenth graders, and 2,335 twelfth graders" and concluded that "the very high rates of cigarette smoking found among American teenagers in the late 1990s are associated with the popularity of just three brands: Marlboro . . . Newport . . . and Camel . . . these have been among the most heavily advertised and promoted cigarette brands[.]" Hering Aff., Ex. 91.

83. A study entitled "Changes in the Cigarette Brand Preferences of Adolescent Smokers--United States, 1989-1993" was published in the Centers for Disease Control, Morbidity And Mortality Weekly Report, 43(32): 577-604 (19 Aug. 1994). The study finds that the three most heavily advertised brands, Marlboro, Camel and Newport, have been the three most popular with adolescents. Hering Aff., Ex. 9.

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Smokeless Tobacco

90. A three year population based telephone survey conducted in 1990, 1992, and 1993 entitled "Does advertising promote smokeless tobacco use among adolescent boys? Evidence from California," by Won S. Choi et al., was published in *Tobacco Control* 1995; 4 (Suppl 1): S57-S63). The California survey included (n = 3912 in 1990, 883 in 1992 and 2814 in 1993) adolescent boys aged 12 to 17 years and men between the ages of 18 and 24. The study concluded that "[d]espite the large scale California Tobacco Control Program, adolescent use and susceptibility to use smokeless tobacco remained unchanged from 1990 to 1993." While "[e]xposure

to other smokeless tobacco users was the largest predictor of both current use and susceptibility to use smokeless tobacco[,]. . . peer approval and exposure to tobacco advertising were also both significant predictors for use and susceptibility." Hering Aff., Ex. 64.

* * * *

Cigars

93. Advertising expenditures of the cigar industry have increased dramatically in recent years, as has cigar consumption, including among youth. Report of the Federal Trade Commission to Congress, *Cigar Sales and Advertising and Promotional Expenses for Calendar Years 1996 and 1997* (1999). Hering Aff., Ex. 71; *NCI Monograph No. 9, Cigars: Health Effects and Trends*, Chapter 7. Hering Aff., Ex. 67.

94. The Federal Trade Commission has found that cigar industry advertising and promotional expenditures increased by 32% over a two-year period (1996-1997), "with large spending increases on point of sale advertising and public entertainment events." Point of sale advertising increased almost 37% from 1996 to 1997. "By far, the industry's largest expenditures in 1996 and 1997 were on promotional allowances--that is, discounts and other incentives given to retailers to encourage cigar sales." Report of the Federal Trade Commission to Congress, *Cigar Sales and Advertising and Promotional Expenses for Calendar Years 1996 and 1997* (1999). Hering Aff., Ex. 71, pp. 2, 4, 5.

95. In the same period of the substantial increase in advertising expenditures, aggregate unit sales of the five largest cigar manufacturers increased from 3.8 billion cigars to 4.4 billion cigars, of 15% from 1996 to 1997. In the period from 1993 to 1998, cigar consumption increased by 57%, with the greatest increase in cigar smoking prevalence occurring among young adult men. *Id.* at 3, 8.

96. Approximately 27% of fourteen to nineteen year olds had smoked at least one cigar in the previous year, and 3% of adolescents had smoked more than 50 cigars in the previous year. *Id.* at 9.

97. A substantial number of adolescents in Massachusetts obtain and smoke cigars. *Cigar Smoking Among Teenagers--United States, Massachusetts, and New York, 1996* MMWR Report, May 23, 1997, Hering Aff., Ex. 72; *Testimony of Dr. Michael Cummings*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 73; *Testimony of Dr. Lois Biener*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 74; *Testimony of Dr. Stephen Soldz*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 75; *Five City Tobacco Control Collaborative*, Compliance Check, January 1998 (minor purchases of cigar at pharmacies, convenience stores, and smoke shops), Hering Aff., Ex. 76; *Testimony of Eileen Sullivan, Five City Tobacco Control Collaborative*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 77. *See, also,* DiFranza, et al., *A Comparison of the Advertising and Accessibility of Cigars, Cigarettes, Chewing Tobacco and Loose Tobacco,* submitted for publication, 1999; *Cigars: Health Effects and Trends.* Hering Aff., Ex. 61.

98. According to one focus group study, 63% of teens participating in the study recalled seeing cigar advertising, including in magazines, billboards, and novelty apparel. *Youth Use of Cigars: Patterns of Use and Perceptions of Risk,* Office of Inspector General, Department of Health and Human Services, February, 1999. Hering Aff., Ex. 78.

* * * *

Tobacco Control and Education Efforts in Massachusetts

100. The Massachusetts Tobacco Control Program ("MTCP") was established in 1993. The MTCP seeks to reduce the public health risks of tobacco use. A comprehensive set of statewide and local MTCP activities informs Massachusetts residents about tobacco risks, provides cessation services to smokers, and promotes public policies that reduce youth access to tobacco products and limit public exposure to environmental tobacco smoke. Connolly Aff., ¶¶ 1-16.

101. In fiscal year 1998, approximately $21 million of the Massachusetts Health Protection Fund was distributed to Massachusetts school districts to support comprehensive health education, including education on tobacco prevention and smoking cessation. The amount of each grant is based on the student population of each school district, with approximately $24 allocated for each child. Affidavit of Nancy Coville ("Coville Aff.") ¶ 2.

102. All Massachusetts school districts now have tobacco-free school policies. Coville Aff., ¶ 4.

103. 95% of health educators are now teaching tobacco use prevention, with the greatest emphasis being placed on middle school students. Coville Aff., ¶ 4.

104. Over half of school districts provide tobacco education to parents, and three-quarters have tobacco control programs linked to community programs. Coville Aff., ¶ 4.

105. Members of MTCP-funded youth programs have sponsored or participated in over 3,200 community tobacco education and prevention events, such as public speaking engagements and recreational or cultural events. In fiscal year 1998, almost 900 MTCP-funded events drew a total attendance of over 160,000 people. Connolly Aff., ¶ 13.

106. For each of the following fiscal years, the MTCP budget was:

a. 1995: $43.1 million;

b. 1996: $41.8 million;

c. 1997: $36.8 million;

d. 1998: $36.8 million; and

e. the budget for fiscal year 1999 is $36.9 million. Connolly Aff., ¶ 3.

107. For each of the following fiscal years the MTCP media campaign budget was:

a. 1994: $16 million

b. 1995: $14 million

c. 1996: $13 million

d. 1997: $11.70 million

e. 1998: $11.21 million; and

f. the MTCP media campaign budget for fiscal year 1999 is $11 million. Connolly Aff., ¶ 5.

108. Massachusetts' fiscal year 1996 budget for tobacco control activities funded by the Department of Public Health and the Department of Education was $65 million, or $10.60 per capita. Connolly Aff., Ex. A, p. 85.

Youth Tobacco Use

109. The Massachusetts Department of Education conducted Youth Risk Behavior Surveys in 1993, 1995 and 1997. Affidavit of Carol Goodenow ("Goodenow Aff."), ¶¶ 2 and 5.

110. In 1997, the Massachusetts Youth Risk Behavior Survey (MYRBS) found that 34.4% of Massachusetts High

School students (grades 9-12) were recent cigarette smokers (smoked cigarettes at least once in the last 30 days). This is a slight decrease from the 1995 MYRBS survey results, which found recent cigarette use to be 35.7% among high school students, but still higher than the 1993 MYRBS survey results, which found recent cigarette smoking to be 30.2% among high school students. Goodenow Aff., Ex. C, p. 7.

111. In 1997, the Massachusetts Youth Risk Behavior Survey found that 6.0% of Massachusetts High School students (grades 9-12) were recent users of smokeless tobacco (used smokeless tobacco at least once in the last 30 days). This is a decrease from the 1995 MYRBS survey results, which found recent smokeless tobacco use to be 8.4% among high school students, and a decrease from the 1993 MYRBS survey results, which found recent smokeless tobacco use to be 9.4% among high school students. Goodenow Aff., Ex. C, p. 7.

112. The Massachusetts Department of Public Health study "Adolescent Tobacco Use in Massachusetts: Trends Among Public School Students 1984-1996" found that 14.5% of Massachusetts high school students (grades 9-12) were current users of cigars (smoked cigars at least once in the last 30 days), and 38.9% of Massachusetts high school students were lifetime users of cigars (smoked cigars at least once in their lifetime). Hering Aff., Ex. 50, p. 5 and Table 4.

113. In 1995, rates of recent cigarette smoking (smoked cigarettes at least once in the last 30 days) among Massachusetts high school students, as reported by the Massachusetts Youth Risk Behavior Survey (MYRBS), were slightly above those reported by the National Youth Risk Behavior Survey (35.7% vs. 34.8%). Due to slight increases nationally and slight decreases in Massachusetts, the rates of recent cigarette smoking in the 1997 MYRBS among Massachusetts high school students dropped below national rates (34.4% vs. 36.4%). Goodenow Aff., Ex. C, p. 8.

114. The 1997 Massachusetts Youth Risk Behavior Survey found that 69% of Massachusetts High School students have tried smoking cigarettes, at least one or two puffs (lifetime smoking). Goodenow Aff., Ex. C, p. 6.

115. The 1997 Massachusetts Youth Risk Behavior Survey found that 24% of Massachusetts High School students smoked a whole cigarette for the first time before they were age 13. This rate has remained virtually unchanged since the 1993 Massachusetts Youth Risk Behavior Survey. Goodenow Aff., Ex. C, pp. 7, 9.

116. The 1997 Massachusetts Youth Risk Behavior Survey found that 26% of students who had smoked in the past month and who were age 17 or younger reported that they usually got their cigarettes by buying them in a store. Goodenow Aff., Ex. C, p. 10.

117. The 1997 Massachusetts Youth Risk Behavior Survey found that Massachusetts high school students were significantly more likely in 1997 than in 1995 to be asked for proof of age if they tried to buy cigarettes in a store: 61% were asked for proof of age in 1997, compared to only 49% who were asked in 1995. Goodenow Aff., Ex. C, p. 10.

118. 63% of current Massachusetts adult smokers started smoking before they were 18 years old. Only 12% began after age 21. Connolly Aff., ¶ 15.

* * * *

120. The 1998 MTCP media campaign carried a number of new advertisements targeted towards youth. In addition to information on health risks, they presented messages to counter some of the beliefs that make tobacco use acceptable or desirable among young people. For example, one series of ads emphasized that young people can quickly become addicted to nicotine, while another countered the idea that smoking makes one socially attractive. Connolly Aff., ¶ 5.

Tobacco Control and Retailer Compliance Checks (non AG)

121. 177 Massachusetts cities and towns, accounting for more than three-quarters of the population of the Commonwealth, now require merchants who sell tobacco products to be licensed. Connolly Aff., ¶ 10.

122. Limits on free-standing displays of tobacco products are in effect in communities that contain more than two-thirds of Massachusetts residents. 87 Massachusetts towns have completely banned vending machines, 75 require lockout devices, and 56 limit vending machines to locations that are not accessible to youth. Connolly Aff., ¶ 5.

123. The average rate of non-compliance with M.G.L. c. 270, § 6 (forbidding sale or distribution of tobacco to minors) for both MTCP-funded and non-funded communities in Massachusetts in 1998 was 19.3%, as measured by the protocol for the Massachusetts Statewide Compliance Survey. Connolly Aff. ¶ 10; Affidavit of Sarah Coelho ("Coelho Aff."), Ex. A, Attachment # 6f, p. 3.

124. About 80% of MTCP-funded Boards of Health programs performed over 8,000 tobacco control ordinance enforcement activities during Federal Fiscal year 1996. The average rate of non-compliance with M.G.L. c. 270, § 6 (forbidding sale or distribution of tobacco to minors) among funded programs has gone from an average of 70% in early 1994 to under 10% in mid-1997. Coelho Aff., Ex. A, Attachment # 6f, p. 3.

125. During the period from October 1, 1997 through September 30, 1998, 950 citations for illegal sales of tobacco from local tobacco control programs resulted in $48,238 in fines. Coelho Aff., Ex. A, Attachment # 6a, p. 1.

126. 5.7 million of the 6 million residents of Massachusetts reside in cities or towns that receive funding from the MTCP. Coelho Aff., Ex. A, Attachment # 6f, p. 1.

127. During the time period from January of 1994 to June of 1998, local Boards of Health and Health Departments, together with other local-MTCP-funded programs performed:

a. 46,568 checks of retail premises to make sure that they had appropriate signs indicating the prohibition on sales to minors;

b. 31,603 controlled buying attempts, in which youth under age 18 attempted to purchase cigarettes and reported on the results;

c. 7,561 checks of compliance with vending machine restrictions.

Connolly Aff., ¶ 8.

128. From January of 1994 to June of 1998 illegal sales of tobacco to minors in Massachusetts have resulted in a total of 1,910 citations and $139,325 fines levied by MTCP-funded programs. In March-May of 1994, the average non-compliance rate was 48% in MTCP-funded communities. Since that time, retailer compliance has improved, and the violation rate was under 10% in MTCP-funded communities in April-June of 1998. Connolly Aff., ¶ 10.

129. The MTCP assists in the funding of local boards of health and local health departments in Massachusetts, in part for the purpose of performing checks of local compliance checks. The citation rate (which is the percentage of observed violations which result in a citation) climbed from 13% in 1994 to 53% in the first half of 1998. Connolly Aff., ¶ 6.

130. The MTCP carries out checks of tobacco retailers in Massachusetts to determine in they are in compliance with M.G.L. c. 270, § 6 (prohibiting sales or distribution of tobacco to minors) as part of a project funded by the U.S. Food and Drug Administration. These compliance checks are performed in communities across Massachusetts, even where there was no local tobacco control program. Over 5,000 compliance checks

were carried out by the MTCP as part of this project in 1998. Over 8,000 compliance checks have already been performed by the MTCP as part of this project in 1999. During these compliance checks, the average non-compliance rate was 22.8% in 1998, and the average non-compliance rate for the first six months in 1999 was 29.7%. Connolly Aff., ¶ 11.

* * * *

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	CIVIL ACTION NO.99-11118-WGY
REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	**Expert Report of Dr. Edward V. Morse**

PHILIP MORRIS INCORPORATED,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts,	)
Defendant.	)
BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts,	)
Defendant.	)

Dr. Edward V. Morse is a behavioral scientist, trained at Cornell University. He received his Ph.D. in 1971. A major focus of his research has been health-related social patterns, and research methodology. After graduating from Cornell, Dr. Morse accepted an academic appointment at Tulane University as an Assistant Professor in 1971. He became an Associate Professor with tenure in 1977 and is now a full member of the Graduate Faculty at Tulane. Dr. Morse was awarded a Fulbright Scholarship in 1981 to conduct research and teach in the area of behavioral medicine in Bogota, Colombia. Dr. Morse served as University Chairman of the department of Sociology from 1977 to 1985. Since being at Tulane, he has

held a range of other positions, including Adjunct Associate Professor Department of Biostatistics and Epidemiology, Director of the Center for Applied Social Research, Clinical Professor of Psychiatry, LSUMC, New Orleans, Louisiana, and Adjunct Associate Professor of Pediatrics, Tulane University Medical School, New Orleans, Louisiana. For the last twenty-nine years, Dr. Morse has played an active research role in the scientific community.

Since 1990, Dr. Morse has received funding for work on more than 25 grants and contracts in the area of behavioral medicine. The vast majority of his research funding has come from the Centers for Disease Control and Prevention, the National Institute of Allergic and Infectious Diseases, the National Institute of Mental Health, the American Association of Retired People, and W.T. Grant Foundation. During the last decade, he has devoted the greater portion of his research effort to the study of factors underlying high-risk behavior patterns of adolescents and younger adults. Dr. Morse is currently the Principal or Co-Principal Investigator of over $1,000,000 in grants' funds. Dr. Morse's research findings have resulted in publication in a wide range of professional peer-reviewed journals, nationally and internationally presented posters, and nationally and internationally presented papers. He teaches a graduate level course in behavioral medicine and annually lectures on specific behavioral medicine topics to the Tulane School of Public Health and Tropical Medicine and the Tulane School of Medicine.

Dr. Morse has served as a consultant to the White House, the United Sates Department of Health and Human Services, the State of Louisiana (public schools and school-based health care) and other private and public agencies to assist in the translation of research findings into public policy which produce more effective programmatic interventions. Dr. Morse's curriculum vitae, which presents his professional, and academic activities in greater detail is attached.

SUMMARY OF OPINIONS AND BASIS FOR OPINIONS

Dr. Morse's opinions and testimony are based on his academic training, primary and secondary research experiences, field research experience, publications, consulting, the scientific literature on the issues, and ongoing review of other pertinent materials and other information reasonably relied upon by members of his profession. He also bases his opinion upon his review of advertisements, public opinion polls and surveys, government documents, and publications by the National Institutes of Health and Centers for Disease Control and Prevention. A list of principal references relied upon by Dr. Morse is attached. Dr. Morse's work in this case is ongoing. He may review additional documents and discovery produced or to be produced by the defendant and may supplement this report. Dr. Morse will rely on the work and opinions of other experts in this case. Dr. Morse may also offer testimony in response to related issues raised by the Commonwealth.

Dr. Morse will testify about high-risk behavior patterns among children and adolescents. Patterns of high-risk health behavior tend to occur in cycles and reflect fads or trends that differ within subgroups (e.g. males vs. females, 12 year-olds vs. 16 year-olds, etc.). As a group, a significant portion of adolescents is likely to engage in unsafe premarital sex, drive over the posted speed limit, not use seat belts, experiment with non-prescription street drugs and alcohol, smoke cigarettes, operate equipment without appropriate head safety wear, carry firearms, fight in school, and disregard proper nutritional intake and appropriate daily exercise. High-risk health behavior patterns may be placed on a continuum from behaviors with high probabilities of resulting in immediate health compromising consequences, to those with low probabilities of even a small negative long-term impact on health. As adolescents grow up, the majority greatly reduce or eliminate many high-risk health behavior patterns, including tobacco use.

Dr. Morse will also offer his opinion, based on decades of research and observation, that children's and adolescents' behavior patterns related to smoking are primarily and directly influenced by their peers' and parents' smoking behavior patterns. Past "focus group" data collected by the FDA, as well as national and international studies, demonstrate that smoking behavior patterns, similar to other high-risk health behavior patterns, are influenced by peers, parents, siblings, extended family members, and significant others in their local communities. Further, these same sources of influence play a predominant role in shaping the adolescents' choice to continue to smoke or abstain from smoking.

There is no credible social science research that demonstrates that adolescents' exposure to commercial marketing, advertising, promotions or sponsorships of any cigarette company has any impact on the decision to start smoking. Further, research findings suggest that adolescents' exposure to commercial marketing, advertising, or promotions and sponsorships statistically do not account for any pattern of smoking. If cigarette advertising had the impact on the smoking behavior patterns of children and young adults that it is alleged to have, one would expect smoking patterns of young people to be homogeneous (e.g. all adolescents exposed to cigarette advertising would smoke). Data from the 25-year trend study of substance use patterns conducted by the University of Michigan, fails to support such an assertion. Instead, the data clearly show that by age, grade in school, region of the country, gender and ethnicity, patterns of smoking vary in ways that have no relationship to cigarette advertising and promotion.

In fact, these patterns, which cannot be explained by exposure to advertising, are much more closely associated with social and psychological factors such as peer and family exposure. Indeed, these same social and psychological factors predict other high-risk behaviors, such as use of illicit drugs,

that are not advertised in any fashion. Thus, efforts to alter adolescents' smoking behavior by limiting their exposure to cigarette advertising are not likely to have any significant or meaningful impact on the smoking initiation patterns of adolescents.

Based on the literature and past experience, it has been demonstrated that the best way to reduce the incidence and prevalence of adolescent smoking is to enforce the state laws which prohibit minors from purchasing or possessing cigarettes. In recent years, state data on efforts to reduce underage smoking demonstrate overwhelmingly that vigorous enforcement of legal restrictions on underage access to tobacco products will reduce such smoking.

Dr. Morse will testify that during the last two decades a significant shift in thinking has occurred at both the state and national level regarding the most effective ways of addressing the question of adolescent smoking. Increasingly, states are exploring the significant impact that enforcement of laws can have on reducing adolescent access to and use of tobacco. Since the 1980s it would appear that the many efforts at educating the public regarding smoking and health issues have had the intended impact of gradually reducing the prevalence of adult smokers in the United States. This trend has not been mirrored in the smoking prevalence rates of adolescents during the same time period. Since the eighties, rates of adolescent smoking in general have either stubbornly stayed very stable, or within some groupings have actually risen. Data coming from both the Monitoring the Future Project and the National Youth Risk Behavior Survey underscore these trends in adolescent smoking. During this time period at least three major studies have found that where communities vigorously supported and enforced their laws regarding the prohibition of the sale of tobacco to persons under the age of 18 that tobacco usage by adolescents dropped significantly. Data from these and other studies examining a wide range of issues surrounding

the concept of restricting youth access to tobacco by means of the enforcement of laws overwhelmingly bolster the argument that youth access laws are the most powerful weapon our society has to address this health issue.

REASONS WHY PERSONS ENGAGE IN HIGH-RISK BEHAVIOR PATTERNS

Dr. Morse will testify about the reasons shaping a person's tendency to engage in high-risk health behavior. He will testify that there are significant others with whom the adolescent smoker identifies for his or her self-image and those groups consist of peers, family members, extended family members and others in the person's local community. Peer group affiliation directly impacts the prevalence of high-risk health behavior patterns in adolescents. A person's specific group or "crowd" membership or affiliation exerts a dominant influence on his or her high-risk health behavior patterns. Put simply, people like to belong to groups and do what their group of peers is doing. Adolescents take their cues from their actual circle of peers. This fact explains why cigarette advertising has little, if any, impact on adolescent smoking behavior.

SURVEY DATA REFLECTING HIGH-RISK CHOICE PATTERNS

Dr. Morse will testify that data from multiple sources all confirm the power and influence of friends, peers and family on why people start to smoke. Analysis of the extensive data collected by the Gallup Organization, the Food and Drug Administration, the Centers for Disease Control and Prevention, and even by defendant's expert, Dr. Dean Krugman, regarding why people smoke, makes it clear that adolescents begin smoking, not because of advertising, but because of social influences such as peers, parents, siblings, members of extended family, and significant others. These are the factors that adolescents identify consistently. Of equal importance is the lack of any survey or poll data that indicate

that commercial advertising by cigarette companies has any impact on an adolescent's choice to stag smoking. This absence of data is especially important when considered within the context of the models presented earlier, which stress the importance of peers and family members as major sources of influence in shaping smoking patterns by adolescents.

Over the last decade, behavioral science has generated an extensive body of research specifically focused on adolescents. By far the most significant research on youth health risk behavior patterns has been conducted as part of the Youth Risk Behavior Surveillance System (YRBSS). The CDC developed the YRBSS to monitor health risk behavior patterns of adolescents in six major categories: behaviors that contribute to unintentional and intentional injuries, tobacco use, alcohol and other drug use, sexual behaviors that contribute to unintended pregnancy and STDs including HIV infection, unhealthy dietary behaviors, and physical inactivity.

Since data was first collected in 1990, trends analysis has reached several significant conclusions. The high-risk health behaviors of youth across the six areas of risk behavior are highly correlated, as are the factors associated with each risk behavior. In other words, young people who engage in any one of these behaviors tend to engage in others as well, and the set of factors that predict one such behavior also tend to predict the others.

The 1997 YRBSS indicates that many high school age youths engage in behavior patterns that may significantly contribute to their likelihood of dying. For example, 19.1% rarely or never use a safety belt, 35.3% had ridden during the 30 days preceding the survey with a driver who had been drinking alcohol, 32.8% had ever used marijuana, 22.1% had carried a weapon during the 30 days preceding the survey, and 8.6% had attempted suicide during the preceding 12 months. In addition, 41.8% of the youth nationwide reported having been in a physical fight in the preceding 12 months; of the 50%

of all high school students who reported being sexually active, almost half reported not practicing safe sex techniques. Obviously, there is no commercial advertising promoting any of these behaviors.

Dr. Morse will also testify about the study of youth risk behavior patterns conducted by the University of Michigan Institute for Social Research entitled Monitoring the Future, 1975-1994. Monitoring the Future has been funded by the National Institute of Drug Abuse (NIDA) for the purpose of tracking substance use patterns, onset of use of a wide range of substances by adolescents, and their patterns of continued use or discontinuation over time. For both legal and illicit substances, data are gathered regarding students' attitudes and beliefs, beliefs and behaviors of others in their social environment, and perceived drug availability in their environments.

The differential rates of various high-risk health behaviors generally, and substance use specifically, strongly suggest that the observed patterns are best understood as culturally-based or anchored patterns which are shown to be specific to particular relatively homogeneous subgroups (e.g. black high school seniors), over time and exhibit strong trends suggesting substance use tends to occur in cycles and to reflect fads or trends that differ within subgroups (e.g. males vs. females, 12 year olds vs. 16 year olds, etc.). One pattern that seems to be very clear is age cohorts have a tendency to gravitate toward adopting those high-risk behavior patterns that preceding cohorts did not or do not use. An example of this tendency that the reader might easily identify is the recent rise (and subsequent decline) in cigar smoking as well as cigar bars and cigar restaurants, trends that appear to have been largely unaffected by commercial advertising.

Researchers are becoming increasingly aware that as individuals move through the life cycle from childhood and adolescence into adulthood, the primary socializing agent

responsible for dictating the cultural norms to be followed changes dramatically. During childhood, parents and other members of an individual's immediate nuclear, and in some cases, extended family, are the most important sources of information and the primary socializing agents. This gradually changes as a child moves into adolescence. During this next phase, the individual is much more attentive to his peers. Not until the child reemerges from adolescence and moves into young adulthood does he or she anchor his or her patterns of socialization based on older adults and adult dominated institutions. The general timing of the shifts in the life cycle as well as the shifts of the differential influences of peers over any particular range of the cultural, material, cognitive and normative dimensions of an individual's socialization are determined not only by chronological age, but social class, ethnicity and race as well.

For all the foregoing reasons and based on my extensive professional experience, it is my firm opinion that the decision of adolescents to begin smoking is influenced by many social and psychological factors, factors which are largely unaffected by regulation, and which do not include commercial advertising. Accordingly, restricting such advertising will not, in my opinion, affect the incidence of underage smoking. In particular, in my opinion the regulations challenged in this action will not contribute to their stated goal. Since regulation will not significantly affect demand, the logical strategy for reducing the incidence of underage tobacco is to restrict supply. Communities that have successfully reduced underage smoking have done so by a concerted and coordinated community effort to restrict underage access to tobacco products, and not by restricting cigarette advertising.

/s/ Edward V. Morse
Edward V. Morse Ph.D.

Dated: November 4, 1999

[Filed Nov. 5, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	CIVIL ACTION NO.99-11118-WGY and consolidated cases
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	**AFFIDAVIT OF LUCY L. HENKE, Ph.D.**
PHILIP MORRIS INCORPORATED, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	

BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

* * * *

Expert Report of Lucy L. Henke, Ph.D.

Professional Background and Qualifications

1. I am Associate Professor of Marketing at the University of Louisiana at Lafayette. An accurate copy of my curriculum vitae is attached as Exhibit A to this affidavit.

2. In addition to my academic activities, while I was employed with Louis Harris and Associates, I designed and conducted studies of the effectiveness of particular consumer advertising campaigns on behalf of companies engaged in consumer brand marketing. After I left Louis Harris, I was employed by ABC Television Marketing and Research Services Division and had responsibility for tracking viewer perceptions of ABC's and competing networks' news programming.

Summary of Opinions

3. For the reasons summarized in this report, it is my opinion, based on my experience in the field of advertising, marketing and consumer behavior and my review of the pertinent professional literature, that tobacco advertising and promotional activity play no role in the decision of minors (or anyone else for that matter) to use tobacco products. As a

result, I consider it most unlikely that restricting such activity will have any material impact on reducing the incidence of underage use of tobacco. In particular, this is true of the regulations that have been challenged in this action. I will discuss, first, generally accepted principles of advertising and promotion and consumer behavior that bear on the role of commercial marketing in consumer decision making, and, second, the application of those principles and the results of an extensive body of empirical research on the question of whether the commercial advertising and promotion of cigarettes and other tobacco products affects the incidence of underage tobacco use. A list of the principal publications on which I rely for my opinion is attached.

Role of Brand Advertising in a Mature Consumer Product Market

4. It is well-established in the field of marketing communications that in a mature product market, the effect of advertising and promotion is primarily to maintain brand loyalty and to encourage consumers of competing brands to switch to the advertised brands and to purchase the advertised brand as an "alternate" brand if the consumer's preferred brand is unavailable. Let me explain what I mean by a "mature" product market.

5. It has long been recognized that most consumer products pass through a product "life cycle." When a new product category is introduced (e.g., DVD players today, personal computers nearly twenty years ago), most consumers do not know what the product is, what its characteristics are and whether the product is useful or desirable. The purpose of advertising and promotion at this introductory stage is to stimulate demand for a product category regardless of brand. As the authors of a recent marketing text write:

> When an organization is the first to introduce an innovative product, it tries to stimulate *primary demand*—demand for

> a product category rather than for a specific brand of product—through pioneer promotion. *Pioneer promotion* informs potential customers about the product: what it is, what it does, how it can be used, and where it can be purchased. Because pioneer promotion is used in the introductory stage of the product life cycle, which means that there are no competing brands, it neither emphasizes brand names nor compares brands. The first company to introduce the compact disc player, for instance, initially attempted to stimulate primary demand by emphasizing the benefits of compact disc players in general rather than the benefit of its specific brand.

Pride & Ferrell, *Marketing: Concepts and Strategies* 398 (1997). For consumers, this type of advertising may be an important source of product information because other sources of information—e.g., personal experience with the product, the experiences of friends and family members, images of product use in the media—are largely unavailable as a result of the product's novelty. It is also significant that at this stage, all potential consumers, young and old alike, learn about the product's attributes at roughly the same time.

6. As a product category matures, advertising takes on a different role and purpose: from stimulating primary demand for the product category to stimulating "selective demand," i.e. maintaining or shifting consumer preferences for particular brands. For example, because automobiles are a mature product, consumers learn at a very early age from their families and their first-hand experience what a car does and for what activities a car is useful. People do not need commercial advertisements to help them decide whether they want a car (or a VCR or a toothbrush) in the first instance. The market for such products has matured and the purpose of advertising in such a market is to persuade those who have already decided to use the product to select the advertised brand. The focus is brand differentiation. For example, one automobile

manufacturer might stress the roominess and comfortable ride of its products, while another will emphasize sporty handling, a third stylish design, and a fourth great value. People who have no interest in owning a car, however, are not a target market for the marketers of automobiles, and those people largely ignore the vast majority of ads for automobiles.

7. It is very difficult for a marketer in a mature product market to affect aggregate demand for that product category. A good recent example of an attempt to do so is the campaign sponsored by the dairy industry to increase overall consumption of milk. While the "celebrity milk moustache" billboards and the "Got milk?" catchphrase are popular, the campaign apparently has not resulted in significantly increased milk consumption. In fact, consumption has declined every year during the time of this campaign. O'Guinn et al. (2000); *Marketing News* (1998). This lack of success is not surprising in light of what we know about consumer decision making. A consumer's decision whether to drink milk will be affected far more by whether the consumer likes the taste of milk and on whether family and friends drink milk than on even a very clever and engaging advertising campaign. Thus, even where a campaign is specifically designed to stimulate demand for a product category, it is very difficult through advertising to affect aggregate demand for a mature product. A campaign designed to promote a specific brand is even less likely to have such an effect.

The Market for Tobacco Products is a Mature Market

8. Cigarettes and smokeless tobacco products are classic examples of mature, if not declining, consumer product markets in which advertising is entirely brand advertising that seeks to stimulate selective demand for particular brands. In a mature or declining market, sellers are competing for market share and the goals of advertising and promotion are to persuade consumers of competing products to switch to the advertised brand as their primary or alternate brand choice

while, first and foremost, maintaining the brand loyalty of existing customers against the efforts of competitors to persuade them to switch. In a product market as large as that for cigarettes, even small percentage shifts in market share have huge economic significance. Even a one percent share of such a market represents hundreds of millions of dollars in revenues and justifies significant expenditures on advertising and promotion to protect and expand one's market share.

9. Research in the field of marketing confirms that tobacco advertising serves to stimulate selective, not primary, demand. As Wilcox (Wilcox 1991; Wilcox and Vacker 1992) and others have shown, there is no evidence that cigarette advertising does anything other than differentiate brands. Sturgess (1982) confirms the finding that cigarette advertising, which takes place in a mature product category, serves to stimulate selective demand. Duffy (1996) investigated the effect of total cigarette advertising on aggregate demand for cigarettes in the United Kingdom and found no evidence that advertising increased total market demand for cigarettes. Duffy concluded that a total ban on cigarette advertising would not reduce consumption but would have the effect of altering the market share of brands or types of tobacco products. The conclusions are consistent with the testimony of Daniel Oliver, the Chairman of the Federal Trade Commission before the Transportation Subcommittee of the House Committee on Energy and Commerce on April 3, 1987: "Far from stimulating overall demand by conveying new information to consumers about the uses of tobacco generally, tobacco advertising is likely to have its predominant impact in affecting the consumers' selection among competing brands."

10. The marketing focus of tobacco companies on existing smokers is even clearer with regard to promotions such as coupons, price discounts, and programs that reward brand-loyal smokers with non-tobacco merchandise. It is difficult to see how these programs can have any meaningful

value to non-smokers. A coupon or discount for an undesired product is worthless, and even if the premiums offered as a reward for repeat purchases are desirable to non-smokers, it is hard to believe that a non-smoker will purchase large numbers of undesired cigarettes just to earn sufficient credits to obtain an item that can be purchased directly for less than the total spent on the cigarettes. This is particularly true in light of the Master Settlement Agreement in which the major cigarette companies agreed not to offer merchandise branded with tobacco brand logos even to adult smokers. Whatever appeal branded merchandise might have had is obviously no longer relevant.

11. Any suggestion that tobacco products are not a mature market because new consumers are entering the market and older consumers are leaving it is specious. The same can be said of absolutely any consumer product. One of the principal characteristics of a mature market is that advertising is not a significant initial source of information about the product, and this is as true for tobacco products as it is for toothpaste. What distinguishes the mature market from markets for newly introduced products is that in the latter consumers of all ages are learning about the product at the same time for the first time without the benefit of prior experience.

12. In short, there is no evidence that the advertising or promotion of tobacco products has any effect on the initiation of tobacco use, increases aggregate tobacco consumption, or does anything other than influence brand selection.

Effect of Advertising on Behavior of Minors with Regard to Tobacco Products.

13. It is also my opinion that tobacco advertising and promotion plays no material role in the decision of minors to begin using tobacco products. In addition to the foregoing

principles, which I believe apply to adolescent consumers as well as to adults, I base my opinion on the following points.

14. First, there is a substantial body of empirical data that confirms that the decision of teenagers to use tobacco is primarily influenced by peers and family members. This research reveals no significant role played by tobacco advertising or promotion in influencing that decision.

15. Second, there is a dearth of credible social science research to support the hypothesis that tobacco advertising or promotion plays a role in the decision by minors (or anyone else for that matter) to begin to use tobacco products. The very few studies that purport to support this hypothesis suffer from such severe logical and methodological flaws as to provide no scientifically valid evidence.

16. Third, my own research and that of others suggests that children are fairly sophisticated consumers who learn at an early age that product advertising is intended to persuade and that they generally respond skeptically to advertising. Awareness of brand logos cannot be equated with a positive attitude toward the advertised product or an intent to purchase it, and my own research confirms that this is true with regard to tobacco advertising.

17. Fourth, the experience in other countries that have imposed restrictions or bans on tobacco advertising suggests that such efforts have little or no effect on tobacco consumption.

18. In the remainder of this report, I will elaborate on these four points and respond to the arguments made by the defendant's experts.

Smokers Consistently Fail to Identify Advertising as a Reason for the Decision to Begin Smoking

19. Years of polling research confirms that peer and parental influence, and not advertising, drive adolescent

decisions to begin smoking. The Gallup Organization has conducted surveys over the years which ask a nationally representative sample of adults (1993) and adolescents (1994) why they began to smoke. In both surveys the majority of respondents identified peer influence as the driving force, followed by parental influence. Attached as Exhibits B and C are graphs summarizing these results. These surveys were open-ended in the sense that Gallup simply asked the question without offering a list of possible responses. In a closed-ended poll that offered advertising as one of the choices, only 1% of the respondents cited advertising as an influence. (Gallup 1991) Attached as Exhibit D is a graph summarizing these results. Consistent with open-ended surveys, peer influence was cited by the majority of respondents, followed by parental influence, curiosity and rebellion. Social science research using survey methodology which permits respondents to select multiple influences yields the same results. (Zinser 1997) Attached as Exhibit E is a graph summarizing these results.

20. Contrary to the contentions of some that individuals may be reluctant to identify advertising as an influence due to embarrassment, the Zinser poll confirmed that advertising is an influence on brand choice. Specifically, when respondents were asked about the influence that advertising had on brand choice, advertising came in third out of five. Research in other areas confirms that people are willing to identify advertising as an influence on decisionmaking when it does, in fact, have such an influence.

Source Other Than Advertising and Promotion Significantly Influence Underage Tobacco Use

21. Many studies provide evidence that young people acquire information about products, including tobacco products, from many sources other than advertising. (Adler, et al., 1980; Tinsley 1992; Moschis 1985; Ward, Wackman and Wartella 1977)

* * * *

30. Numerous other studies corroborate and confirm the conclusion that relatives and peers are the most significant influences on a minor's decision to begin smoking. They include: Oygard et al. (1995), Wang et al. (1997), Jackson (1997), Conrad et al. (1992), McDonald (1993), "Teenage Smoking: National Patterns of Cigarette Smoking, Ages 12 through 18, in 1968 and 1970," U.S. Dept. of Health, Education and Welfare (1970); Gallup polls (1977, 1994); Zinser (1994).

- *Absence of Credible Evidence Linking Tobacco Advertising with Smoking Initiation*

31. Second, there is no credible social science research that supports the proposition that exposure to tobacco advertising leaders to smoking initiation, and no evidence whatsoever that the particular marketing practices prohibited in the regulations challenged in the litigation have any impact on the decision of adolescents to begin to use tobacco.

32. In order to demonstrate a link between tobacco advertising and underage smoking initiation, it would be necessary to undertake a "longitudinal study," i.e. a valid study of a sample of minors over time that measured changes in smoking behavior and found a statistically significant relationship between exposure to tobacco advertising or promotion and such changes in behavior. As noted above, there are a number of longitudinal studies demonstrating the influence of family and peers on smoking inititiation. There is only one published paper that claims to have found such a relationship between tobacco marketing and smoking initiation: Pierce et al. (1998). The Pierce study claims to be the first longitudinal study to "provide[] clear evidence that tobacco industry advertising and promotional activities can influence nonsusceptible never smokers to start the process of becoming addicted to cigarettes." (Pierce 1998, at 514) It does nothing

of the sort. For the reasons set forth below, the Pierce study is deeply flawed and provides no scientifically valid evidence for any link between tobacco marketing and smoking initiation by minors.

* * * *

48. The only other longitudinal study that I have seen which purports to find a link between tobacco advertising and promotion and smoking initiation is an unpublished article by Biener and Siegel (in press) that was submitted to the court in this case. This article employs essentially the same methodology as the Pierce study, and consequently suffers from the same deficiencies. Indeed, the authors corroborate my opinion that "receptivity" is a proxy for the influence of family and friends rather than an independent predictor. They state: "Receptivity was significantly associated with living in a household where at least one adult smoked, having one or more smokers among one's close friends, being an early experimenter and scoring above the median in rebelliousness."

49. I am aware of nothing else that even purports to be a longitudinal study demonstrating any kind of causal link between tobacco advertising or promotion and smoking initiation by minors (or anyone else for that matter). Since the Pierce and Biener studies provide no credible evidence to support such a link and since the literature is replete with studies identifying other factors such as peer and parental influence as of primary importance, I conclude that there is no basis in social science literature to conclude that such a causal link exists. The absence of such evidence is not surprising since it would contradict what students of marketing have long understood about the role of advertising and promotion in a mature product market.

Children are Relatively Sophisticated Consumers and Typically Learn to React Skeptically to Advertising.

50. The arguments in favor of advertising bans are premised on the assumption that minors are vulnerable "sponges," incapable of recognizing the persuasive intent of advertising messages. However, this assumption has been thoroughly discredited by studies of children's perceptions of advertising.

* * * *

54. The later studies demonstrated that when a nonverbal measure is used, even younger children can express an understanding of the persuasive intent of ads. Studies by Henke (1980) and Donohue, Henke and Donohue (1980) found that as many as 75% of 3-year-olds were able to express an understading of the persuasive intent of ads when a nonverbal measure was used. By the age of 6, 96% of the children in these studies indicated an understanding of selling intent when a non-verbal measure was used.

55. The significance of this research is that children, like adults, who understand the persuasive intent of an advertisement are more likely to be skeptical, even cynical, about the advertised message. The concept of "source credibility" helps to explain the relationship between identification of the selling intent of an ad and skepticism of the advertised message.

* * * *

75. In fact, a study I conducted with Dr. Michelle Wolf (Henke and Wolf 1995) demonstrated that parents of young children have used the Joe Camel brand advertising logo to reinforce anti-smoking messages with their children. Parents as well as older siblings and peers play a very important role in influencing young people's decisions about smoking. Using cigarette advertising symbols to deliver anti-smoking messages

to children is but one example of the way in which consumers use advertising.

Cigarette Advertising is not "Pervasive" to Minors

76. Advocates of tobacco advertising bans frequently claim that extreme steps are needed because tobacco advertising is "pervasive." This term is not usually defined, but the rhetoric of "pervasiveness" is usually coupled with figures (derived from FTC reports) that suggest that the tobacco industry spends vast sums on advertising and promotion.

77. A comparison between the tobacco industry and other consumer product industries, however, reveals that tobacco marketing expenditures are comparatively modest. For example, attached as Exhibit F is a chart (based on Competitive Media LNA/Media Watch Multi-Media Service Ad Dollar Summary, January-December 1996) showing where tobacco advertising expenditures compare with advertising expenditures for other industries. Amounts spent on advertising tobacco products in the United States is less than 10% of the amounts spent on marketing automobiles, and considerably less than the amounts spent on marketing food, toiletries and cosmetics, computers/office equipment, apparel, insurance, and many other product categories. In 1997, the amount spent on cigarette advertising was only .8% of the total amount spend on advertising in the U.S. See Exhibit G.

78. Moreover, tobacco marketing is completely absent in broadcast media. It is well-known that television is the medium most likely to reach underage audiences. In addition, the 1998 settlement agreement between tobacco manufacturers and 46 states including Massachusetts imposes further limits on cigarette advertising (e.g. no transit advertising, no billboards). To be sure, the research summarized above makes it clear that minors are familiar with at least the most widely promoted cigarette brands. It is, however, misleading to say that

cigarette advertising today is a dominant presence in the advertising that young people encounter.

There is No Discernible Relationship between Expenditures on Cigarette Advertising and Promotion and the Incidence of Underage Smoking.

79. Some advocates of restrictions on tobacco advertising and promotion have claimed to have found relationships between specific cigarette advertising campaigns and trends in smoking incidence. The publicly available data simply do not support this contention.

80. Attached as Exhibit H to this report is a graph that plots cigarette sales and tobacco industry marketing expenditures (all as reflected on industry reports to the Federal Trade Commission) for the period 1970-1995. Cigarette sales have generally declined while advertising expenditures either rose or remained constant while spending on non-advertising promotions generally increased. Nothing in these data suggests any causal link between marketing expenditures and smoking consumption.

81. Moreover, if one compares aggregate spending on cigarette advertising and promotion and the incidence of youth smoking over time, it is also apparent that there is no relationship. Attached as Exhibit I is a graph that plots tobacco industry marketing expenditures (as reflected on industry reports to the FTC) and the percentage of high school seniors smoking in the past 30 days (derived from the University of Michigan's "Monitoring the Future Survey"). As the graph illustrates, there is no basis for inferring a causal link between marketing expenditures and adolescent smoking. The incidence of youth smoking has generally declined but even in years when it has not declined there is no evident relationship between tobacco marketing expenditures in the period immediately preceding the change and the change itself.

* * * *

86. Advocates of advertising restrictions also argue that adolescents are encouraged to begin smoking through the "allure" of toacco advertising which conveys images of "independence, healthfulness, adventure-seeking and youthful activities." They further argue that teens take up smoking to achieve these desirable qualities. In fact, however, there is almost no consumer product being advertised today that does not utilize one or more of these very same themes and images in its advertising. Truth be told, the old, the infirm, the dependent and the "boring" are not frequently (if ever) pictured in advertising for any consumer product. In light of the ubiquity of the themes of youth, attractiveness, health, and adventure in American advertising today, one must ask why a teen would choose to smoke to identify with these attributes rather than simply buy an advertised fragrance, show or blue jean unless something more than advertising was in play.

Experience in Countries that have Restricted or Banned Tobacco Advertising Suggests that such Actions have Little Effect on Smoking Rates

87. If the advocates of restrictions on tobacco advertising and promotion were correct, then one would expect to see that the implementation of such restrictions in other countries would consistently result in a reduction of smoking incidence, particularly on the part of minors. In fact, the data do not support this conclusion. The experience of countries that have implemented advertising bans is far more equivocal. Indeed, some of the countries that have implemented such bans have experienced an actual increase in smoking rates.

88. In Canada, when cigarette brand advertising was banned in 1990, consumption among young people went up. This increase occurred after a twenty year decline in overall consumption in Canada. In Norway, consumption of tobacco in 1996 remained unchanged from 1975, the year an advertising ban was introduced. In Finland, smoking among young people has increased since the advertising ban of 1978.

89. In addition, it is worth noting (as the Surgeon General did in his 1979 report) that in Communist countries such as China and the former Soviet Union, where consumer advertising was not permitted, smoking rates were quite high. Rosch (1996) reported that "[w]hile smoking decreased by 25-38% in Western Europe during the last decade, it has increased 4-11% annually in Russia." He further notes that more than 15% of 5th grade Russian boys smoke. In China, tobacco use rates are increasing. Li, et al. (1996) report that smoking is prevalent among early adolescent Chinese youth, and that the annual increase of cigarette consumption between 1982 and 1990 was over 7% (referencing Stanley, 1993).

Signed under the pains and penalties of perjury this 4th day of November, 1999.

/s/ Lucy L. Henke
Lucy L. Henke, Ph.D.

[Filed Nov. 5, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	CIVIL ACTION NO. 99-11118-WGY
REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	

PHILIP MORRIS INCORPORATED, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	
BROWN & WILLIAMSON TOBACCO CORPORATION, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	**EXPERT REPORT AND AFFIDAVIT OF LAURENCE J. DeFRANCO**

LAURENCE J. DeFRANCO, being of legal age and duly sworn, deposes and say:

1. I am the president and co-founder of InContext, Inc., an international information company located in Washington, D.C. that performs digital computer mapping and charting of economic data. I make this affidavit based on personal knowledge.

2. I have expertise in the field of geo-economics, which merges the disciplines of economics, geography, and computer science. More detailed information about my background,

including the articles and books I have authored, and information about InContext, is attached hereto as Exhibit A.

3. In May of 1998 I was asked to prepare, and did prepare on behalf of the four tobacco companies that are plaintiffs in these consolidated actions, maps depicting the precise amount of area which would remain potentially available to outdoor advertisers of tobacco products in three Massachusetts cities under regulations proposed by the Massachusetts Attorney General that would restrict outdoor tobacco advertising. Proposed 940 CMR 2.04(d). The maps that I prepared, and an accurate description of the methodology I used to prepare the maps, were filed in the administrative record on Proposed 940 CMR § 2.01 et seq., as attachments to Comments on the proposed regulations filed by the four companies dated June 18, 1998. True and correct copies of the maps I prepared, and of the statement of my methodology, are attached as Exhibits B and C hereto.

4. The maps I prepared show the area that would remain available for outdoor advertisers of tobacco products if the Attorney General's prohibition on outdoor advertising covered an area within a radius of 1,000 yards from schools, parks and playgrounds (as indicated in the Attorney General's Proposed Regulations), and also showed the area that would remain available for outdoor advertising if the prohibition covered an area within a radius of 1,000 feet, from schools, parks and playgrounds, which is the area of the prohibition indicated in the Attorney General's final regulations, now codified at 940 CMR § 21.01 et seq.

5. As described in the attached statement of the methodology I used to prepare the maps, Exhibit C hereto, the attached mapping analysis involves no assumptions, no theories and no estimates. It is based on official United States Geological Survey maps for each city.

6. My analysis demonstrated that, if a 1,000 foot radius is used to define the area where outdoor advertising is prohibited, which is the area specified in Section 21.05(5) of the Attorney General's final regulations: (a) the percentage of the Land Area of the City of Boston that would be unavailable for outdoor tobacco advertising is 90.6%; (b) the percentage of the Land Area of the City of Worcester that would be unavailable for outdoor tobacco advertising is 87.8%; and (c) the percentage of the Land Area of the City of Springfield that would be unavailable for outdoor tobacco advertising is 88.8%. See Exhibit C hereto. These results are depicted on the maps attached hereto as Exhibit B.

Signed under the pains and penalties of perjury this 2nd day of November, 1999.

/s/ Laurence J. DeFranco
Laurence J. DeFranco

Sworn to and subscribed before me this 2nd day of November, 1999.

[illegible]
Notary Public

My Commission expires November 30, 2002.

[Filed Nov. 5, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	**CIVIL ACTION NO. 99-11118-WGY and consolidated cases**
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	AFFIDAVIT OF ROLF PROVAN
PHILIP MORRIS INCORPORATED, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	

BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

Rolf Provan, being duly sworn, deposes and states as follows:

1. I am director of trade development at Brown & Williamson Tobacco Corporation ("B&W") and have held this position since February 1998. Prior to becoming Director of Trade Development, I was Director of Marketing Information from April 1996 through January 1998; Brand Manager from September 1995 to March 1996; Regional Director from February 1994 through August 1995; Area Market Manager from July 1992 through January 1994; International Marketing Coordinator from December 1991 to July 1992. From 1989 to 1991, I worked in various local sales and marketing positions with affiliates of B&W located in Chile and Hong Kong. I am competent to make this affidavit, which is based on my personal knowledge of the information stated below.

2. During my nearly eight years at B&W, I have become knowledgeable about B&W's cigarette sales and marketing programs to retail outlets. Over the past 18 months, I have worked closely on the development and implementation of B&W cigarette promotional and merchandising programs. As part of my job responsibilities, I have become very familiar with B&W's present marketing efforts for all of its major domestic cigarette brands, including the impact that promotional

programs, including buy-downs, stickers and other discounting methods, and merchandising programs, such as indoor displays and signage, have on the sale of cigarette brands.

3. B&W is the third largest cigarette manufacturer in the United States. Last year, B&W's share of the domestic market was approximately 15%. B&W manufactures and sells both "premium" brands, such as Kool®, Carlton®, Capri® and Lucky Strike®, and value-for-money, or "value" brands, such as GPC®.

4. The purpose of B&W's marketing efforts is to increase our share of adult smokers by building and developing brand equity (the reputation and good will associated with a particular brand) for our cigarettes. Increasing brand equity maintains loyalty among current adult smokers of B&W brands and encourages adult smokers of competitive brands of cigarettes to switch to a B&W brand.

5. Brown & Williamson's marketing plans are not designed or intended to attract non-smokers, or smokers under the age of 21. Since the mid-1960's, B&W has adhered to internal and industry cigarette marketing codes designed to restrict our intended advertising audience to adults 21 years or older, and limit our marketing to techniques, locations and mediums aimed at adult smokers. B&W has supported industry efforts and initiated company efforts to educate minors not to smoke and to educate retailers not to sell to minors. Our Corporate and Youth Responsibility department works companywide to monitor our marketing efforts and to develop new strategies and programs to reduce underage smoking.

6. I understand that the Challenged Regulations would prohibit self-service product displays and require all tobacco products to be kept out of the reach of consumers at all retailers, and would eliminate outdoor advertising and indoor advertising lower than five feet off the ground at many retail outlets.

7. Our experience at B&W indicates that the retail environment is the primary source of brand awareness for adult smokers.

8. Channels for communicating with adult consumers regarding cigarettes have been drastically reduced due to the current regulatory environment. Because many traditional avenues of communication, including but not limited to outdoor billboards, transit stop and taxi signs, have been eliminated, retail display space and signage is more crucial now than ever before to the advertising and promotion of cigarette brands.

9. Laws that restrict or eliminate self-service displays, such as 940 CMR §§ 21.04(2)(c) & (d) are causing available retail display space for cigarettes to shrink to the limited space available behind the sales counter (the "backbar") or beneath the counter and wholly out of sight.. This is especially true in "pack outlets," e.g., convenience and gas stores, where available display area is already much less than in supermarkets and other types of stores. This limited space is usually devoted to only a few brands.

10. Similarly, laws that restrict or eliminate retail signage, both indoor and outdoor, further cause a dramatic reduction in the avenues available to B&W to communicate to adult consumers who choose to smoke.

11. The display of a cigarette brand at retail is a vitally important form of communication which gives the manufacturer the opportunity to reinforce the brand's existence and prominence to smokers of that brand and also provides the primary opportunity to encourage adult smokers to pick up, view and purchase a pack of an unfamiliar brand or a newly introduced or repositioned brand.

12. If a cigarette brand is not visible at retail or is relegated to space that is not in the line of sight of a potential adult consumer, that brand will have great difficulty communicating

its availability and/or competitive characteristics as compared with more visibly displayed brands.

13. Space for both product displays and promotional materials at pack outlets, as well as all outlets which sell tobacco products, is significantly limited. Much of the available space for visible display and promotion at the point-of-sale at pack outlets are self service displays on countertops.

14. In addition, the requirement that all advertising be placed five feet or more above the ground at most retail outlets further eliminates alternative means that B&W uses to communicate with adult customers, such as change mats, cash register signs, counter top signs, or mid-level display rack signs. Common sense and experience indicates that the amount of space five feet or more above the floor that is not taken up by shelving, coolers or freezers, windows, and is otherwise available for advertising is limited, especially at pack outlets. Even now, retailers generally are paid a premium for such space.

15. Point of sale advertising and merchandising, including primarily self-service displays, are critical to B&W's communication with its current customers as well as potential customers who currently smoke non-B&W brands. Indeed, many of our key brands are marketed predominantly through the use of self service displays and by promoting price competition at the retail counter.

16. B&W's value for money brands are promoted almost exclusively through self-service displays and other point-of sale advertising. The success of GPC® and other value brands is dependent on their ability to attract customers of premium brands at the point of sale through price promotions, including use of discount stickers on packs, buy-one-get-one-free programs, and "buy downs" in which B&W sales representatives pay a retailer to discount the consumer price on a given brand. The ability to communicate these price

promotions to adult smokers at the point-of-sale through ready access to marked-down packs at countertop product displays are therefore central to the competitive existence of these brands. The Massachusetts regulations would render these products virtually invisible, denying adult consumers even basic identifying information such as what the pack label looks like.

17. The growth of the value segment has come predominately from consumers who, upon seeing a self-service display and other in-store promotions, decide to try a new B&W value-for-money cigarette rather than their usual premium brand cigarette. Unless an adult consumer can see the value cigarette and the price at the point of sale, our experience teaches us that loyal customers may believe that the retail outlet does not carry the product and that potential new customers will never learn of the product or the promotion.

18. Historically, we have observed that consumers have imperfect pricing and promotional information about the value brands. If B&W is not able to indicate to the consumer at the point of sale pricing and other information, consumers will simply purchase visibly-displayed premium brand cigarettes with which they are more familiar.

19. With little or no space to display, advertise and promote, it will be extremely difficult for B&W to communicate with consumers regarding B&W's premium brands as well. The ban on self-service display and the significant restrictions on other point-of-sale advertising make it more difficult, if not impossible, to reposition the image or significantly raise adult consumer awareness of an existing brand. Over the past few years, B&W has invested large sums in repositioning many of our premium brands, such as Kook® and Carlton®. Self-service display was of vital importance for B&W to communicate to current brand smokers and potential brand-switchers the product's new brand identity and packaging.

20. Further, B&W's launch of new brand styles, most recently Lucky Strike Filters® and Kool Natural®, are heavily dependent on point-of-sale promotion and self-service display. Self-service displays allow an adult consumer to examine a new product and review its packaging, which may contain brand equity, price or other product information, customer service contacts, and, of course, the Surgeon General's warning.

21. As the third-ranking cigarette manufacturer, it is especially important for B&W to achieve visibility for its brands at retail in order to persuade adult smokers to continue to smoke or to switch to our brands. It is our experience that adult consumers will be much more likely to purchase our brands if we are able to sufficiently communicate our brands, and price promotions to customers through self-service displays and point-of-sale advertising.

22. If our products are forced behind or under the counter throughout the Commonwealth of Massachusetts by these regulations, B&W will be denied critical avenues of speech to lawful consumers of our products. If, as the regulations contemplate, all tobacco products are forced behind the counter, the less dominant brands, value brands, niche products, and new products will become virtually invisible. The five-foot restriction on indoor that would be placed on many retail establishments will further eliminate B&W's ability to communicate with adult smokers. Due to our market position and the array of brands B&W sells, most if not all B&W brands will be stored out of view and reach of customers. Being denied these avenues of communication would cause B&W irreparable injury.

Signed and sworn under the pains and penalties of perjury this 5th day of November, 1999.

/s/ Rolf Provan

Rolf Provan

COMMONWEALTH OF KENTUCKY)
) ss
COUNTY OF JEFFERSON)

Sworn and subscribed to
before me this 4th day of
November, 1999.

/s/ Ann le Barnicott
Notary Public

My commission expires: Notary Public, State at Large, KY
My commission
expires Mar. 17, 2001

GROWING UP TOBACCO FREE PREVENTING NICOTINE ADDITION IN CHILDREN AND YOUTHS

Barbara S. Lynch and Richard J. Bonnie, Editors

Committee on Preventing Nicotine Addition
in Children and Youths

Division of Biobehavioral Sciences and Mental Disorders

Institute of Medicine

NATIONAL ACADEMY PRESS

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NOTICE: The project that is the subject of this report was approved by the Governing Board of the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The members of the committee responsible for this report were chosen for their special competencies and with regard for appropriate balance.

This report has been reviewed by a group other than the authors according to procedures approved by a Report Review Committee consisting of members of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

The Institute of Medicine was chartered in 1970 by the National Academy of Sciences to enlist distinguished members of the appropriate professions in the examination of policy matters pertaining to the health of the public. In this, the Institute acts under both the Academy's 1863 congressional charter responsibility to be an adviser to the federal

government and its own initiative in identifying issues of medical care, research, and education.

* * * *

4 TOBACCO ADVERTISING AND PROMOTION

INTRODUCTION: MAINTAINING THE MARKET

Every day, children and youths in the United States are exposed to a wide array of persuasive, carefully crafted commercial messages encouraging the use of tobacco products. In 1991 the tobacco industry spent $4.6 billion–more than $12.6 million a day, $8,750 a minute–on advertising and promoting* cigarette consumption, and over $100 million on advertising and promoting smokeless tobacco products.[1] During the past 15 years, the tobacco industry has nearly quadrupled** its marketing expenditures, at a time when tobacco consumption has been declining. Each day, approximately 3,500 Americans quit smoking and an additional 1,200 tobacco customers and former customers die of smoking-related illness; therefore, maintaining current levels of tobacco use and revenues requires that approximately 5,000 new smokers be recruited every day (about 2 million a year).[2] Children and youths constitute the most likely source of new smokers. The 1991 National Household Surveys on Drug Abuse data reveal that the large majority (89%) of persons ages 30-39 who ever smoked daily tried their first cigarette by age 18, and 62% by age 16; over three quarters (77%) were smoking daily before age 20.[3] At least 3 million American teenagers smoke regularly and 3 million people who regularly use smokeless tobacco are under Age 21.[4]

* * * *

What factors have contributed to stable smoking rates and to increased rates of smokeless tobacco use among children and youths, but have proven to be less effective in sustaining

tobacco use by adults? Public health advocates suggest that youths have a heightened sensitivity to image advertising and promotion themes at a time in their lives when they are struggling to define their own identities. Adolescence is characterized by three major types of developmental challenges: (a) physical maturation, (b) cultural pressures to begin the transition to adult roles and emotional independence from parents, and (c) establishment of a coherent self-concept and values.[11] Cigarette advertisements are often evocative and play off these challenges in addition to being positioned to appeal to specific groups defined by social class and ethnic identity. Early adolescence (ages 11-14) in particular may be a time of increased susceptibility to the appeal of image advertising and promotions. The possible effects of marketing techniques on youths are considered below.

* * * *

Promoting Tobacco Use to Consumers

The goal of marketing is to increase the appeal and acceptability of a product as well as to make the product available to the potential consumer. Tobacco marketing strategies (a) establish attitudinal predispositions that lead nonusers to experiment with tobacco products and interpret their experience as positive and rewarding, (b) foster the perception that consumption of tobacco products in general and in particular contexts (places, times) is normative, (c) minimize concern about the potential risks associated with tobacco use, propagating the perception that there are "safe" smoking options, and (d) reassure smokers and users of smokeless tobacco that possible risks are worth the benefits received from tobacco use. Marketing strategies promote both brand-specific and aggregate tobacco use. The impression that tobacco use is desirable and normative is conveyed through image advertising and promotions that make tobacco products highly visible in public spaces–if not by their presence, then by proxy in the forms of brand trademarks, insignia, logos, and

items associated with preestablished brand images (for example, adventure scenarios). The major forms of marketing are highlighted below.

* * * *

2. *Promotional allowances* constitute the second largest tobacco marketing expenditure–25% of all marketing-related expenditures.

* * * *

As a result of trade incentives, cigarettes and other tobacco products are displayed prominently where adults as well as youths of all ages can see them. Self-service displays are an important source of tobacco products for minors.[18] Cigarettes are commonly displayed near checkout counters, and flavored chewing tobacco has been reported to be displayed near candy racks in convenience shops. A survey in California of stores near high schools found chewing tobacco next to candy and snacks in 42% of the stores.[19]

* * * *

3. *Point-of-sale advertising* showcases particular brands of cigarettes in shops to stimulate impulse purchases. Since the 1971 ban on broadcast advertising, tobacco companies have made marketing through distribution a major function of their sales forces, which numbered more than 9,000 industry wide in the early 1980s.[20] This marketing technique places the tobacco products in convenient, visible racks, usually self-service, and in point-of-purchase displays.

* * * *

Point-of-sale advertising in retail establishments has been increasing and in 1991 represented 7.4% of advertising and promotional expenditures.

* * * *

5. *Outdoor Advertising*

* * * *

More permanent than magazine advertising, and seen over and over again by youths, billboard ads expose children repeatedly to pro-tobacco messages and give the erroneous impression that smoking is pervasive and normative.

* * * *

Market Segmentation to Reach Youths

Considerable research on the part of the tobacco industry has resulted in the positioning of specific brands in different market segments. This entails vigilant monitoring of changing responses to brand images and consumption patterns among specific populations in a competitive market. Particular market niches are targeted for intensive advertising activities. Capturing a share of the starters market, which is predominantly under age 20, is important to tobacco companies because of the amount of brand loyalty and switching within brand families. Several studies have been specially commissioned by the tobacco industry to study the youth market,[42] although the tobacco industry has claimed that it does not target underage youth in its advertising campaigns. Youths constitute not only a market segment in their own right but also a subgroup of market segments defined in relation to gender, socioeconomic status, ethnicity, etc. Research suggests that, regardless of intent, marketing pitches aimed at young adults ages 20-25 are also appealing to youth of the same class, gender, and ethnic group. For example, the tobacco industry heavily advertises in magazines that appeal to youthful readerships, for example *Spin, Rolling Stone, Cycle World, Mademoiselle, Glamour,* and *New Woman.*[43] A consideration of the impact of advertising on children and youths therefore demands an understanding of those subpopulations targeted by the industry as market growth segments: women, the less educated, and ethnic groups. A

method for identifying which market segments are specially targeted by the tobacco industry would entail trend surveillance of two elements of tobacco advertising and promotion: (1) where the ads are being placed and therefore who is likely to see the ads, and (2) to whom the context and message of the ads appeal.

* * * *

Psychosocial Mechanism Through Which Advertising Influences the Behavior of Children and Youths

* * * *

Psychologists have described specific mechanisms by which advertising makes tobacco use appear attractive to smokers and potential smokers. Ajzen and Fishbein's *theory of reasoned action* postulates, in brief, that intentions to perform a particular act are predicted both by a person's attitude toward the act and by normative beliefs about it, concordant with "what others think."[50] Ajzen and Fishbein argue that personal attitudinal factors are probably more important in decisions that adults make concerning smoking, whereas social normative factors are more important in the decisions of children. Other psychologists have suggested that children understand the intent of image advertising at a young age.[51] According to the theory of reasoned action, advertising can function either as a direct normative influence by shaping a child's image of what it means to be a smoker or as an indirect normative influence by increasing peer pressure associated with the emulation of role models provided by cigarette advertising. In his exhaustive 1976 review of the literature, Fishbein noted: "there can be little question that cigarette ads attempt to create a positive image of the 'smoker.'" He concluded that "our review suggests that cigarette advertising does affect cigarette consumption."[52]

* * * *

Image advertising, smoking is portrayed as an expression of independence, individualism, and social sophistication. It engages the consumer in a fantasy and invites the consumer to participate in a promise "that the product can do something for you that you cannot do for yourself."[54] A self-image that the target audience already desires is reinforced.[55] For example, smoking is associated with a strong masculine self-conception. It is depicted as relieving stress, and as winning the admiration of wholesome, fun-loving peers. The models in cigarette ads appear healthy and happy, in stark contrast to the negative health consequences of smoking. Adolescents who evaluate positively the attributes of models used in cigarette advertising strongly overestimate the prevalence of smokers and give less thought to long-term consequences of risky behavior.[56]

* * * *

Early adolescence has been characterized as a period of heightened self-awareness as well as preoccupation with one's self-image. Elkind and Bowen described the notion of the imaginary audience, wherein young adolescents feel that they are always on a stage with imaginary others monitoring and evaluating their appearance and activity.[58] Indeed, studies have shown that adolescents whose actual self-concepts are consistent with their perceptions of "stereotypic"smokers (derived from advertisements) are more likely to smoke.[59] Among nonsmokers, teens who admire the attributes depicted by smokers in ads are also more likely to intend to smoke in the future.[60] In order to acquire selected attributes of model smokers, adolescents may be motivated to use tobacco, even when they view smoking as negative.[61]

Social psychologists have found that the tendency to choose behaviors that are consistent with self-concept is stronger when one's self-concept is threatened.[62] Smoking experimentation commonly occurs at transition points in

adolescence when there is a threat to a teen's emerging self-concept: "Teenagers are typically less secure in their identities than most groups in the population, and their age-appropriate task is in part to experiment with different adult identities. They are more subject to social pressure and more attuned to advertising than most groups in the population."[63]

* * * *

Themes and Images

Considerable psychographic research underlies tobacco ad designs.[69] Image advertising tends to appeal to youths.[70] Notably, each of the three brands (Marlboro, Newport, Camel) most popular among youths maximizes a considerable amount of image-based advertising.[71] Even children ages 6-10 are able to identify the images and slogans associated with popular brands of cigarettes.[72] The symbols of the most popular cigarettes among youths, a cowboy and a camel cartoon character, are more likely to appeal to children than to adults.[73] In addition to the theme of independence noted above, five other themes are pervasive in tobacco ads: that tobacco use is a rite of passage to adulthood, that successful people use tobacco, that tobacco use is relaxing in social situations, that tobacco use is normative, and that tobacco use is safe.

1. "*Tobacco use is a rite of passage to adulthood.*" Advertising associates smoking with a passage from childhood to adulthood through sets of images and messages. Smoking is portrayed as a marker of social status (adulthood) and of pleasure appreciated by popular young adults whom teens wish to emulate. Market research has found that teens are more attracted to young adult models in advertisements than to other teens.[74] "Adult themes"–adventure, rugged individualism, independence, sophistication, glamour, and sex–appeal to youths, a fact well established by research of the youth market.[75]

* * * *

2. "*Successful, popular people use tobacco.*" Advertisements effectively associate smoking with sophistication in social and sexual relations. Tobacco image advertisements are appealing to those who are young and impressionable, who would like to acquire the attributes of the models in the ads. The brands most successful with teenagers commonly employ evocative images in their advertising, whether in the form of models or cartoon characters that depict success, sophistication, and self-reliance.[77]

* * * *

3. "*Tobacco use is relaxing in social situations.*" Advertisements position cigarettes and other forms of tobacco as products facilitating peer acceptance. Associating cigarettes with a sense of carefree belonging is reassuring to adolescents at a time of identity construction when social relations are extremely important and teens often feel awkward in social situations.

* * * *

4. "*Tobacco use is the norm.*" By associating tobacco use with commonplace activities, events, social spaces, or mind-sets, advertising reassures users that smoking and chewing are normal, pervasive, and socially acceptable. Advertising links tobacco consumption to routine social activities and transition points in the daily work-play cycle.

* * * *

5. "*Tobacco use is safe and healthful.*"

* * * *

In ads, tobacco use is associated with healthy, outdoor activities, leaving the impression that tobacco use is not only safe but the choice of healthy, vigorous people. Healthiness has been a manifest theme in cigarette ads for at least 60 years.

Images of healthy smokers offer reassurance to would-be quitters.

* * * *

Many of the participants in this ongoing debate seem to assume that a definitive finding of causality is a necessary predicate for legislative action restricting tobacco promotion and advertising. In the Committee's view, however, requiring definitive proof of causality on issues of this nature would unjustifiably stymie sensible public health regulation. Indeed, the history of public health successes, from vaccination to cholera prevention and injury control, suggest that detailed causal understanding is apt to *follow* and intervention, rather than be a precondition for it. If youth smoking fell *after* advertising and promotion were eliminated, this would corroborate a hypothesis for which there is already ample, suggestive evidence–that such advertising and promotion is an important factor in the initiation of tobacco use by youths. This seems to be the lesson from the experiences reviewed in the New Zealand report.

The inability to conduct case control studies in an environment free of tobacco marketing makes it impossible to discern the independent causal effect of advertising and promotion on tobacco consumption.

* * * *

Indeed, when one takes into account the inherent difficulty of discerning a causal influence, the substantial convergent evidence that advertising and promotion increases tobacco use by youths is impressive and, in the Committee's view, provides a strong basis for legal regulation.

Having said this, the Committee does not think that the argument for restricting the advertising and promotion of tobacco products must rest on a definitive or unequivocal finding that such activities causally influence levels of

consumption. It is enough that the advertising and promotional activities described above in this chapter have the natural tendency to encourage initiation and maintenance of smoking by children and adolescents. There can be no doubt that the tobacco companies aim to portray smoking in a favorable light and to communicate messages that link use of tobacco products to positive feelings, images, and experiences. Even if the primary objective of those marketing expenditures is to preserve or expand market share among existing smokers, youngsters are routinely exposed to messages that encourage them to smoke.

* * * *

[Reprinted, with corrections, July 1994]

Preventing Tobacco Use Among Young People

A Report of the Surgeon General

* * * *

Development of the Report

This report of the Surgeon General was prepared by the Office on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention, Public Health Service, U.S. Department of Health and Human Services, as part of the department's responsibility, under Public Law 91-222 and Public Law 99-252, to report current information on the health effects of cigarette smoking and smokeless tobacco use to the United States Congress. This report is the first to focus on the problem of tobacco use among young people.

* * * *

The current report has been produced through the efforts of experts in the medical, pharmacologic, epidemiologic, developmental, economic, behavioral, legal, and public health aspects of smoking and smokeless tobacco use among young people.

* * * *

Major Conclusions

1. Nearly all first use of tobacco occurs before high school graduation; this finding suggests that if adolescents can be kept tobacco-free, most will never start using tobacco.

2. Most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so; they experience relapse rates and withdrawal symptoms similar to those reported by adults.

3. Tobacco is often the first drug used by those young people who use alcohol, marijuana, and other drugs.

4. Adolescents with lower levels of school achievement, with fewer skills to resist pervasive influences to use tobacco, with friends who use tobacco, and with lower self-images are more likely than their peers to use tobacco.

5. Cigarette advertising appears to increase young people's risk of smoking by affecting their perceptions of the pervasiveness, image, and function of smoking.

6. Communitywide efforts that include tobacco tax increases, enforcement of minors' access laws, youth-oriented mass media campaigns, and school-based tobacco-use prevention programs are successful in reducing adolescent use of tobacco.

Summary

Introduction

The health effects of cigarette smoking have been the subject of intensive investigation since the 1950s. Cigarette smoking is still considered the chief preventable cause of premature disease and death in the United States. As was documented extensively in previous Surgeon General's reports, cigarette smoking has been causally liked to lung cancer and other fatal malignancies, atherosclerosis and coronary heart disease, chronic obstructive pulmonary disease, and other conditions that constitute a wide array of serious health consequences (USDHHS 1989). More recent studies have concluded that passive (or involuntary) smoking can cause disease, including lung cancer, in healthy nonsmokers. In 1986, an advisory committee appointed by the Surgeon General released a special report on the health consequences of smokeless tobacco, concluding that smokeless tobacco use can cause cancer and can lead to nicotine addition (USDHHS 1986). In the 1988 report, nicotine was designated a highly

addictive substance, comparable in its physiological and psychological properties to other addictive substances of abuse (USDHHS 1988).

Considerable evidence indicates that the health problems associated with smoking are a function of the duration (years) and the intensity (amount) of use. The younger one begins to smoke, the more likely one is to be a current smoker as an adult. Earlier onset of cigarette smoking and smokeless tobacco use provides more life-years to use tobacco and thereby increases the potential duration of use and the risk of a range of more serious health consequences. Earlier onset is also associated with heavier use; those who begin to use tobacco as younger adolescents are among the heaviest users in adolescence and adulthood. Heavier users are more likely to experience tobacco-related health problems and are the laeast likely to quit smoking cigarettes or using smokeless tobacco. Preventing tobacco use among young people is therefore likely to affect both duration and intensity of total use of tobacco, potentially reducing long-term health consequences significantly.

Health Consequences of Tobacco Use Among Young People

Active smoking by young people is associated with significant health problems during childhood and adolescence and with increased risk factors for health problems in adulthood. Cigarette smoking during adolescence appears to reduce the rate of lung growth and the level of maximum lung function that can be achieved. Young smokers are likely to be less physically fit than young nonsmokers; fitness levels are inversely related to the duration and the intensity of smoking. Adolescent smokers report that they are significantly more likely than their nonsmoking peers to experience shortness of breath, coughing spells, phlegm production, wheezing, and overall diminished physical health. Cigarette smoking during childhood and adolescence poses a clear risk of respiratory

symptoms and problems during adolescence; these health problems are risk factors for other chronic conditions in adulthood, including chronic obstructive pulmonary disease.

Cardiovascular disease is the leading cause of death among adults in the United States. Atherosclerosis, however, may begin in childhood and become clinically significant by young adulthood. Cigarette smoking has been shown to be a primary risk factor for coronary heart disease, arteriosclerotic peripheral vascular disease, and stroke. Smoking by children and adolescents is associated with an increased risk of early atherosclerotic lesions and increased risk factors for cardiovascular diseases. These risk factors include increased levels of low-density lipoprotein cholesterol, increased very-low-density lipoprotein cholesterol, increased triglycerides, and reduced levels of high-density lipoprotein cholesterol. If sustained into adulthood, these patterns significantly increase the risk for early development of cardiovascular disease.

Smokeless tobacco use is associated with health consequences that range from halitosis to severe health problems such as various forms of oral cancer. Use of smokeless tobacco by young people is associated with early indicators of adult health consequences, including periodontal degeneration, soft tissue lesions, and general systemic alterations. Previous reports have documented that smokeless tobacco use is as addictive for young people as it is for adults. Another concern is that smokeless tobacco users are more likely than nonusers to become cigarette smokers.

Among addictive behaviors such as the use of alcohol and other drugs, cigarette smoking is most likely to become established during adolescence. Young people who begin to smoke at an earlier age are more likely than later starters to develop long-term nicotine addiction. Most young people who smoke regularly are already addicted to nicotine, and they experience this addiction in a manner and severity similar to what adult smokers experience. Most adolescent smokers

report that they would like to quit smoking and that they have made numerous, usually unsuccessful attempts to quit. Many adolescents say that they intend to quit in the future and yet prove unable to do so. Those who try to quit smoking report withdrawal symptoms similar to those reported by adults. Adolescents are difficult to recruit for formal cessation programs, and when enrolled, are difficult to retain in the programs. Success rates in adolescent cessation programs tend to be quite low, both in absolute terms and relative to control conditions.

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The Epidemiology of Tobacco Use Among Young People

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How adolescents perceive their social environment may be a stronger influence on behavior than the actual environment. For example, adolescents consistently overestimate the number of young people and adults who smoke. Those with the highest overestimates are more likely to become smokers than are those with more accurate perceptions. Similarly, those who perceive that cigarettes are easily accessible and generally available are more likely to begin smoking than are those who perceive more difficulty in obtaining cigarettes.

Behavioral factors figure heavily during adolescence, a period of multiple transitions to physical maturation, to a coherent sense of self, and to emotional independence. Adolescents are thus particularly vulnerable to a range of hazardous behaviors and activities, including tobacco use, that may seem to assist in these transitions. Young people who report that smoking serves positive functions or is potentially useful are at increased risk for smoking. These functions are associated with bonding with peers, being independent and mature, and having a positive social image. Since reports from adolescents who begin to smoke indicate that they have lower self-esteem and lower self-images than their non-smoking

peers, smoking can become a self-enhancement mechanism. Similarly, not having the confidence to be able to resist peer offers of tobacco seems to be an important risk factor for initiation. Intentions to use tobacco and actual experimentation also strongly predict subsequent regular use.

The positive functions that many young people attribute to smoking are the same functions advanced in most cigarette advertising. Young people are a strategically important market for the tobacco industry. Since most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases. Despite restrictions on tobacco marketing, children and adolescents continue to be exposed to cigarette advertising and promotional activities, and young people report considerable familiarity with many cigarette advertisements. In the past, this exposure was accomplished by radio and television programs sponsored by the cigarette industry. Barred since 1971 from using broadcast media, the tobacco industry increasingly relies on promotional activities, including sponsorship of sports events and public entertainment, outdoor billboards, point-of-purchase displays, and the distribution of specialty items that appeal to the young. Cigarette advertisements in the print media persist; these messages have become increasingly less informational, replacing words with images to portray the attractiveness and function of smoking. Cigarette advertising frequently uses human models or human-life cartoon characters to display images of youthful activities, independence, healthfulness, and adventure-seeking. In presenting attractive images of smokers, cigarette advertisements appear to stimulate some adolescents who have relatively low self-images to adopt smoking as a way to improve their own self-image. Cigarette advertising also appears to affect adolescents' perceptions of the pervasiveness of smoking, images of smokers, and the function of smoking. Since these perceptions are psychosocial risk factors for the

initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.

Efforts to Prevent the Onset of Tobacco Use

Most of the U.S. public strongly favors policies that might prevent tobacco use among young people. These policies include mandated tobacco education in schools, a complete ban on smoking by anyone on school grounds, further restrictions on tobacco advertising and promotional activities, stronger prohibitions on the sale of tobacco products to minors, and increases in earmarked taxes on tobacco products. Interventions to prevent initiation among young people—even actions that involve restrictions on adult smoking or increased taxes—have received strong support among smoking and nonsmoking adults.

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A crucial element of prevention is access: adolescents should not be able to purchase tobacco products in their communities. Active enforcement of age-at-sale policies by public officials and community members appears necessary to prevent minors' access to tobacco. Communities that have adopted tighter restrictions have achieved reductions in purchases by minors. At the state and national levels, price increases have significantly reduced cigarette smoking; the young have been at least as responsive as adults to these price changes. Maintaining higher real prices of cigarettes provides a barrier to adolescent tobacco use but depends on further tax increases to offset the effects of inflation. The results of this review thus suggest that a coordinated, multicomponent campaign involving policy changes, taxation, mass media, and behavioral education can effectively reduce the onset of tobacco use among adolescents.

Summary

Smoking and smokeless tobacco use are almost always initiated and established in adolescence. Besides its long-term effects on adults, tobacco use produces specific health problems for adolescents. Since nicotine addiction also occurs during adolescence, adolescent tobacco users are likely to become adult tobacco users. Smoking and smokeless tobacco use are associated with other problem behaviors and occur early in the sequence of these behaviors. The outcomes of adolescent smoking and smokeless tobacco use continue to be of great public health importance, since one out of three U.S. adolescents uses tobacco by age 18. The social environment of adolescents, including the functions, meanings, and images of smoking that are conveyed through cigarette advertising, sets the stage for adolescents to begin using tobacco. As tobacco products are available and as peers begin to try them, these factors become personalized and relevant, and tobacco use may begin. This process most affects adolescents who, compared with their peers, have lower self-esteem and self-images, are less involved with school and academic achievement, have fewer skills to resist the offers of peers, and come from homes with lower socioeconomic status. Tobacco-use prevention programs that target the larger social environment of adolescents are both efficacious and warranted.

Chapter Conclusions

Following are the specific conclusions for each chapter of this report:

Chapter 2. The Health Consequences of Tobacco Use by Young People

1. Cigarette smoking during childhood and adolescence produces significant health problems among young people, including cough and phlegm production, an increased number and severity of respiratory illnesses, decreased physical fitness, an unfavorable lipid profile, and potential

retardation in the rate of lung growth and the level of maximum lung function.

2. Among addictive behaviors, cigarette smoking is the one most likely to become established during adolescence. People who begin to smoke at an early age are more likely to develop severe levels of nicotine addiction than those who start at a later age.

3. Tobacco use is associated with alcohol and illicit drug use and is generally the first drug used by young people who enter a sequence of drug use that can include tobacco, alcohol, marijuana, and harder drugs.

4. Smokeless tobacco use by adolescents is associated with early indicators of periodontal degeneration and with lesions in the oral soft tissue. Adolescent smokeless tobacco users are more likely than nonusers to become cigarette smokers.

Chapter 3. Epidemiology of Tobacco Use Among Young People in the United States

1. Tobacco use primarily begins in early adolescence, typically by age 16; almost all first use occurs before the time of high school graduation.

2. Smoking prevalence among adolescents declined sharply in the 1970s, but the decline slowed significantly in the 1980s. At least 3.1 million adolescents and 25 percent of 17- and 18-year-olds are current smokers.

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4. Many adolescent smokers are addicted to cigarettes; these young smokers report withdrawal symptoms similar to those reported by adults.

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Chapter 4. Psychosocial Risk Factors for Initiating Tobacco Use

1. The initiation and development of tobacco use among children and adolescents progresses in five stages: from forming attitudes and beliefs about tobacco, to trying, experimenting with, and regularly using tobacco, to being addicted. This process generally takes about three years.

2. Sociodemographic factors associated with the onset of tobacco use include being an adolescent from a family with low socioeconomic status.

3. Environmental risk factors for tobacco use include accessibility and availability of tobacco products, perceptions by adolescents that tobacco use is normative, peers' and siblings' use and approval of tobacco use, and lack of parental support and involvement as adolescents face the challenges of growing up.

4. Behavioral risk factors for tobacco use include low levels of academic achievement and school involvement, lack of skills required to resist influences to use tobacco, and experimentation with any tobacco product.

5. Personal risk factors for tobacco use include a lower self-image and lower self-esteem than peers, the belief that tobacco use is functional, and lack of self-efficacy in the ability to refuse offers to use tobacco. For smokeless tobacco use, insufficient knowledge of the health consequences is also a factor.

Chapter 5. Tobacco Advertising and Promotional Activities

1. Young people continue to be a strategically important market for the tobacco industry.

2. Young people are currently exposed to cigarette messages through print media (including outdoor billboards) and

through promotional activities, such as sponsorship of sporting events and public entertainment, point-of-sale displays, and distribution of specialty items.

3. Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey independence, healthfulness, adventure-seeking, and youthful activities—themes correlated with psychosocial factors that appeal to young people.

4. Cigarette advertisements capitalize on the disparity between an ideal and actual self-image and imply that smoking may close the gap.

5. Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.

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Self-Regulatory Cigarette Advertising Codes

In 1965, the tobacco industry began creating self-regulatory cigarette advertising and promotional codes (U.S. Congress 1965).

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The National Association of Broadcasters Code Authority, which reviewed all advertisements under the self-regulatory process, noted that the volume and character of cigarette advertising were likely to influence the young and were therefore still problematic. In a confidential report, the association expressed its concern:

> Despite changes which have been brought about in cigarette advertising on radio and television, the cumulative

impression created by virtually all of the individual campaigns supports a finding that smoking is made to appear universally acceptable, attractive and desirable. . . . The difficulty in cigarette advertising is that commercials which have an impact upon an adult cannot be assumed to leave unaffected a young viewer, smoker or otherwise. The adult world depicted in cigarette advertising very often is a world to which the adolescent aspires. The cowboy and the steelworker are symbols of a mature masculinity toward which he strives. Popularity, romantic attachment and success are also particularly desirable achievements for the young. To the young, smoking indeed may seem to be an important step towards, and a help in growth from adolescence to, maturity (National Association of Broadcasters 1966, pp. 30-1).

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Historical Perspectives on the Effectiveness of Cigarette Advertising

The role of cigarette advertising in attracting new smokers was easier to recognize in the days when the rate of recruitment exceeded the rate of death and quitting so that total cigarette sales grew. Comments from diverse sources credited cigarette advertising for expanding sales and accelerating market-broadening social trends such as smoking among women. This acknowledgment of cigarette advertising's effects on demand and onset was commented on in articles by academic analysts, advertising agents and journals, the tobacco trade press, and tobacco executives themselves.

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One analyst who annually evaluated the cigarette industry noted that the industry is a "glowing testimonial to the power of advertising. . . . These particular companies have not only out-spent but also have out-earned any other[s]. . . . [T]he

tobacco tycoons . . . are loudest in their praise for the part that advertising has played." (Wootten 1941, p. 5). *Business Week* (1953a) commented that "cigarettes offer the classic case . . . of how a mass-production industry is built on advertising" (p. 66).

Advertising Professionals

Printers' Ink, the leading advertising trade journal of its day, noted in 1930 that sales success already demonstrated "the one feature which has contributed more than any other single factor to the enormous growth of the cigarette industry—advertising" (Tennant 1971, p. 137). This opinion was upheld by the sales performance of cigarettes during the Great Depression: "The growth of cigarette consumption has, itself, been due largely to heavy advertising expenditure. . . . It would be hard to find an industry that better illustrates the economic value of advertising in increasing consumption of a commodity. . . . There can be no doubt but that steady advertising pressure has been a dominating force in increasing cigarette consumption among both men and women" (Weld 1937, pp. 70-2).

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One of the agency executives who had worked on the Marlboro account with Leo Burnett later wrote: "I don't think cigarettes ought to be advertised. . . . [W]hen all the garbage is stripped away, successful cigarette advertising involves showing the kind of people most people would like to be, doing the things most people would like to do, and smoking up a storm. I don't know any way of doing this that doesn't tempt young people to smoke, and, in view of my present knowledge, this is something I prefer not to do" (Daniels 1974, p. 245).

More recently, the late Emerson Foote, a founder of Foote, Cone and Belding and more recently a member of McCann-Erikson, ridiculed the industry claims that its advertising only affects brand switching and has no effect whatsoever on

recruitment: "I don't think anyone really believes this. . . . I suspect that creating a positive climate of social acceptability for smoking, which encourages new smokers to join the market, is of greater importance to the industry. . . . In recent years, the cigarette industry has been artfully maintaining that cigarette advertising has nothing to do with total sales. Take my word for it, this is complete and utter nonsense" (Foote 1981, pp. 1667-8).

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The *United States Tobacco Journal*

The *United States Tobacco Journal*'s frequent and unabashed comments on the power of advertising became something of an editorial litany during the 1950s and early 1960s. In 1953 the journal observed that "advertising, in the hands of manufacturers of tobacco products, has become a powerful tool for the construction of the massive edifice of this industry" (*USTJ* 1953, p. 4). After the industry rebounded from the reports during the early 1950s of a tobacco-cancer link, the journal stated, "There is no obstacle to large-scale sales of tobacco products that cannot be surmounted by aggressive selling" (*USTJ* 1955a, p. 4) and elsewhere noted "the pivotal importance of advertising" (*USTJ* 1955b, p. 4). A year later, the journal could claim that "the effectiveness of current advertising by tobacco products manufacturers has been demonstrated repeatedly by the upward trend in sales volume that results there from" (*USTJ* 1956, p. 4).

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By 1963, the ever-increasing spending on cigarette advertising and promotion led the journal to declare: "The money invested by the tobacco industry in various forms of advertising and promotion essentially reflects the industry's faith in the effectiveness of advertising as a vital sales-building tool. This faith appears justified by the continued annual rise in sales of cigarettes in this country" (USTJ 1963c, p. 4).

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From a perspective two decades after the 1964 Surgeon General's report, the official history of the R.J. Reynolds Company comments that "the company's advertising expenditures and those of its major rivals were extraordinary, reflecting the apparent agreement on the necessity of large-scale advertising to fuel expansion" (Tilley 1985, p. 330).

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The "Maturity" of the Cigarette Market

As a spokesperson for the cigarette industry has argued in a congressional hearing (Ward 1989), the industry considers itself to be operating in a "mature" market—mature because the growth in this market has slowed over the past two decades and because the product being marketed is well known to consumers. This theoretical concept of a mature market is drawn from the "product life cycle," an analogy to the stages of biological development from birth to death. The application of this theory to the cigarette industry hinges on the belief that markets develop in predictable stages and that these stages govern the intent of corporate behaviors, such as advertising and promotion. It has been asserted before congressional hearings, for example, that "in 'mature' markets such as the one for tobacco products, awareness of the product is universal. The function of advertising in a 'mature' market is to promote brand loyalty or brand switching" (Ward 1989, p. 304). The argument continues that the tobacco industry has no strategic interest in youthful nonsmokers because "advertising cannot influence a nonuser to begin using the product category: (Ward 1989, p. 306).

Few studies have specifically examined how the product life cycle applies to the cigarette industry. One early study written in support of the concept defined three substages of market maturity. Of 33 cigarette brands examined, only 36 percent of them were classified into any of the three mature stages, in

contrast with 56 percent of health care and personal care products and 60 percent of food products (Polli and Cook 1969). A few years later, two research directors from the J. Walter Thompson advertising agency reviewed this study and others and counseled readers of the *Harvard Business Review*: "Most writers present the [product life cycle] concept in qualitative terms, in the form of idealization without empirical backing. Also, they fail to draw a clear distinction between product class (e.g., cigarettes), product form (e.g., filter cigarettes), and brand (e.g., Winston). But, for our purposes, this does not matter. We shall see that it is not possible to validate the model at any of these levels of aggregation" (Dhalla and Yuspeh 1976, p. 103).

Advertising textbooks counsel that even when faced with so-called mature markets, advertising firms can and often should attempt both to increase usage among existing customers and to address potential new users. For example, one leading textbook makes it clear that product maturity by no means rules out the capacity—or the need—to attract new users:

> Product class maturity is typified by a slowdown of growth and a fairly constant level of sales. This means that competition may become very intense because any brand can only increase its sales by taking them from a competitor or by developing new uses, users, or changing the product. . . . The brand's objectives during maturity are to defend its position, take share from the competition, promote new uses and users, and support the retailer. . . . In addition, the advertising should stress new uses, new users, and new usage occasions in an attempt to increase overall sales of the product class (Rothschild 1987, p. 105).

It appears that no matter what the appropriate classification of the product, different classes of potential consumers will still exist as market segments with different and particular circumstances. Marketing will thus have to address these

individual segments—including that of young people for whom the product and brands are less well known, and for whom appeal must be created, since cigarettes are not a necessity of life.

Perhaps the strongest indicator that cigarette manufacturers, despite their assertions about encouraging brand switching and fostering brand loyalty, must seek out large numbers of new consumers stems from a striking feature of this mature market. The noted "slow-down" over the past two decades reflects the substantial attrition that has occurred among the industry's consumers: since 1964, about 44 million Americans have quit smoking (CDC 1993), and approximately 9 million more have died of tobacco-related disease (Tye, Warner, Glantz 1987). For the cigarette industry to preserve its mature—that is, slowing in growth but not yet declining—U.S. market status, it must attract some two million new smokers each year to replace these lost consumers. To reach this market of potential new smokers, the industry must earmark a large proportion of the $4 billion annually spent on advertising and promotional activities. As is shown through epidemiologic data in Chapters 3 (see "Age or Grade When Smoking Begins") and 4 (see "Sociodemographic Factors in the Initiation of Smoking") of this report, these new smokers will primarily be adolescents. These potential young consumers have been shown to become aware of cigarettes, in part, through cigarette advertising (Chapman and Fitzgerald 1982; Aitken, Leathar, O'Hagan 1985); moreover, young people appear to develop brand loyalty early on (O'Connell et al. 1981), and because of the addictive properties of nicotine (discussed in Chapter 2), these young smokers are likely to continue into adulthood as cigarette consumers.

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Research on the Effects of Cigarette Advertising and Promotional Activities on Young People

Introduction

A substantial and growing body of scientific literature has reported on young people's awareness of, and attitudes about, cigarette advertising and promotional activities.[3] Research has also focused on the effects of these activities on psychosocial risk factors for beginning to smoke. Considered together, these studies offer a compelling argument for the mediated relationship of cigarette advertising and adolescent smoking. To date, however, no longitudinal study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature. This lack of definitive literature does not imply that a causal relationship does not exist; rather, better quantification of exposure, effect, and etiology is needed. Important data from research conducted for the tobacco industry are not available; such information would add considerably to our knowledge. A definitive study, such as a randomized control trial with young people exposed and not exposed to cigarette advertising, is both practically and ethically impossible. What is possible and needed is research that is longitudinal and multivariate, that takes advantage of recent statistical modeling methods, and that uses large samples of children and young adolescents who have not tried smoking and who have had relatively little exposure to cigarette advertising.

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Young People's Exposure to Cigarette Advertising

Several research studies show that young people are aware of, and respond to, cigarette advertising. In a recent Gallup (1992) study, 87 percent of the 1,125 adolescents surveyed nationwide could recall recently seeing one or more tobacco company advertisements. Similarly, Pierce et al. (1993) found in their study of nearly 7,000 California adolescents that over 90 percent of the 12- and 13-year-olds could name a brand they had seen advertised. Half of the adolescents in the Gallup

survey could identify the cigarette brand name associated with at least one of four cigarette slogans (Gallup 1992).

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Together, the results from these studies show that even relatively young children are aware of cigarette advertising and are able to recall particular advertisements. Older adolescents are moreover capable of interpreting the advertisements in imagistic terms related to attractive features of adult life.

Opinions on Cigarette Advertising and Smoking Behaviors

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Armstrong et al. (1990) conducted a large randomized trial among seventh-grade students (13 years old) in Western Australia in which peer-led and teacher-led programs concerning social influences were evaluated. When the students were resurveyed one year and two years after the intervention, the results identified factors associated with beginning to smoke. Both boys and girls who at baseline reported that cigarette advertisements made them think they would like to smoke a cigarette were significantly more likely to have adopted smoking at the one-year and two-year follow-up surveys than those who did not report feeling this way.

Aitken and Eadie (1990) examined whether the awareness and appreciation of cigarette advertisements were independent of other predictors of adolescent smoking. In this study, 868 Glasgow adolescents between the ages of 11 and 14 years were selected at random and interviewed privately in their homes. Older adolescents, boys, and current smokers in the sample tended to approve of cigarette advertisements and were also more likely to correctly identify cigarette advertisements that carried no brand identification. In general, smokers were more successful than nonsmokers at identifying cigarette advertisements, were more likely to have siblings who smoked, tended to be more approving of cigarette advertisements, and

were less likely to perceive that their parents strongly opposed smoking. These findings suggest that advertising may reinforce the habit of smoking, even among new, young smokers.

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Young People's Self-Image and Implications for Tobacco Use

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The image attributions of adolescents described in this set of studies suggests a mechanism of smoking initiation (Figure 3). The visual images in advertisements may thus serve to shape the ideal self-image of this impressionable audience, since the ads may portray attributes that children and adolescents would like to have. The greater the discrepancy between their self-images and their ideal self-images, the more likely these young people are to try to make their self-images more like their ideal self-images (e.g., by "buying into" an improved self-image through responding with the purchase invited by the ads).

In commercial advertising theory, this notion informs imagery-advertising conceptualization, which presumes that the need for consistency or balance will motivate an individual to try to close the gap between self-image and ideal self-image. (McGuire 1989). This conceptualization entails an active striving to make the self-image more like the ideal self-image, and not the other way around. Imagery-advertising conceptualization is most compatible with identification theories (e.g., role theories, reference-group theories, and self-presentation theories) that stress the need to expand identity by adopting distinctive thoughts, feelings, or actions (McGuire 1989). Thus, the teenaged girl who responds to a Virginia Slims advertisement that portrays independence is motivated to buy and use the product in order to enhance her sense of independence.

Young People's Misperceptions of Smoking Prevalence and Implications for Tobacco Use

In contrast to the image-advertising model described above, the model in Figure 4 is not concerned with the content of cigarette advertisements, but instead with the pervasiveness of the ads. According to this conceptualization, the pervasiveness of cigarette ads leads youth to overestimate the prevalence of smoking and to consider smoking as normative. Studies have consistently reported that adolescents overestimate the prevalence of cigarette smoking (Johnson 1982; Chassin et al. 1984); moreover, those who smoke overestimate smoking prevalence to a greater extent than do nonsmokers (Sherman et al. 1983; McCarthy and Gritz 1984). Overestimating smoking prevalence has been found to be among the strongest predictors of smoking initiation and acquisition (Chassin et al. 1984; Collins et al. 1987; Sussman et al. 1988; see "Perceived Environmental Factors" for smoking in Chapter 4).

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Discussion

Even though the tobacco industry asserts that the sole purpose of advertising and promotional activities is to maintain and potentially increase market shares of adult consumers, it appears that some young people are recruited to smoking by brand advertising. Two sources of epidemiologic data support this assertion. Adolescents consistently smoke the most advertised brands of cigarettes, both in the United States and elsewhere (McCarthy and Gritz 1984; Baker et al. 1987; DiFranza et al. 1991). Moreover, following the introduction of advertisements that appeal to young people, the prevalence of use of those brands—or even the prevalence of smoking altogether—increases. This association was seen among adolescent females after the 1968 introduction of the Virginia Slims brand; smoking prevalence among adolescent females nearly doubled between 1968 (8 percent) and 1974 (15

percent) (USDHHS 1980). A similar associated increase was seen for smokeless tobacco use among adolescent males after a major advertising and promotional campaign in the 1970s focused on "beginners" (Tye, Warner, Glantz 1987). More recently, Camel's Old Joe advertising campaign appears to have substantially increased the brand's market share among persons less than 18 years old (DiFranza et al. 1991).

Advertising and promotional activities also appear to influence risk factors for adolescent tobacco use, even if this is not the intention of the tobacco industry. These psychosocial risk factors—having a low self-image, attributing positive meanings or benefits to smoking, and perceiving smoking as prevalent and normative—strongly predict smoking intentions and smoking onset.

In several countries, concern about health consequences of smoking and the potential influence of advertising on consumption has prompted a nationwide ban on tobacco advertising (UK Department of Health 1992). In 1975, Norway banned all tobacco advertising, sponsorship, and indirect tobacco advertising. In 1977, Finland banned all forms of tobacco advertising. Canada introduced a ban in 1989 on all tobacco advertising, sponsorship, and indirect advertising of Canadian origin. New Zealand introduced a ban in December 1990 on advertising in print media originating in New Zealand, on advertising in posters, and on sponsorship of sports. Although the bans in Canada and New Zealand have been relatively recent, the current evidence indicates that these actions have had a significant effect on consumption in each of the four countries (UK Department of Health 1992). In each case, the banning of advertising was followed by a decrease in smoking rates that persisted even when controlled by changes in other factors, such as price. These studies focused on total cigarette consumption; although the bans appear to have influenced smoking rates among young people in Canada and

Norway, more specific data concerning young people are forthcoming.

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Morbidity and Mortality Weekly Report

August 19, 1994

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Changes in the Cigarette Brand Preferences of Adolescent Smokers -- United States, 1989-1993

Approximately three million U.S. adolescents are smokers, and they smoke nearly one billion packs of cigarettes each year (1). The average age at which smokers try their first cigarette is 14½ years, and approximately 70% of smokers become regular smokers by age 18 years (2). Evaluating the changes in the brand preferences of young smokers can help identify factors that influence adolescents' brand choice and may suggest smoking-prevention strategies (3,4). This report examines changes in the brand preferences of teenaged smokers from 1989 to 1993 using data from CDC's 1993 Teenage Attitudes and Practices Survey (TAPS-II) and comparing them with data from the 1989 TAPS.

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TAPS and TAPS-II indicate that brand preference is more tightly concentrated among adolescents than among adults. In both surveys, at least 85% of adolescent current smokers purchased one of three brands (i.e., Marlboro, Camel, or Newport); however, the three most commonly purchased brands among all smokers accounted for only 35% of the overall market share in 1993.

The three most commonly purchased brands among adolescent smokers were the three most heavily advertised brands in 1993 (7), suggesting that cigarette advertising influences adolescents' brand preference. In 1993, Marlboro, Camel, and Newport ranked first, second, and third (7), respectively, in advertising expenditures. However, Camel and Newport ranked seventh and fifth, respectively, in overall market share (8).

Morbidity and Mortality Weekly Report

July 20, 1995

Trends in Smoking Initiation Among Adolescents and Young Adults -- United States, 1980-1989

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The increase in rates of smoking initiation among adolescents during 1985-1989 may reflect increased real expenditures for cigarette advertising and promotion. The increase in rates occurred during a period when real expenditures for total cigarette advertising and promotion** doubled, and expenditures for cigarette promotion more than quadrupled (7) (Figure 2): from 1980 to 1989, total annual advertising and promotional expenditures (in 1993 dollars) increased from $2.1 billion to $4.2 billion, while promotional expenditures alone increased from $771 million (37% of total expenditures) to $3.2 billion (76%) (Figure 2). Promotional efforts have been highly effective among adolescents. For example, among persons aged 12-17 years in 1992, approximately 50% of smokers and 25% of nonsmokers reported having received promotional items from tobacco companies (1).

An association between overall cigarette marketing expenditures and initiation rates for smoking among adolescents is plausible for at least four reasons. First, brand loyalty is usually established with the first cigarette smoked (8); therefore, cigarette companies have an economic incentive to encourage first-time smokers to smoke their brands. Second, adolescents are exposed to cigarette advertising and promotions that employ themes and images that appeal to young persons (1). Third, advertising directly influences brand awareness and attitudes toward smoking among adolescents (1). Specifically, adolescents smoke the most heavily advertised brands, and changes in brand preferences among young persons are associated with changes in brand-specific advertising expenditures (9). For example, the Joe Camel campaign

introduced nationally in 1988 was associated with an increase in the market share of that specific brand among adolescents (1,9). Finally, consumer research suggests that younger persons (i.e., aged 14-17 years) aspire to be young adults (10); therefore, advertising and promotional efforts targeted toward young adults may have greater appeal to adolescents because of their age aspirations.

Although current estimates of smoking initiation rates among adolescents are not available, from 1991 through 1993, the national prevalence of smoking increased among eighth- and 10th-grade students (6). To reverse the trend of increasing smoking initiation rates among adolescents and to achieve the national health objective for the year 2000 of reducing the initiation of cigarette smoking by youth (no more than 15% should become regular smokers by age 20) (objective 3.5) (4), prevention efforts that focus on young persons should be intensified. Such efforts could include making cigarettes less affordable by either increasing their real price (1) or by limiting sales to cartons rather than individual packs, enforcing laws prohibiting the sale and distribution of cigarettes to young persons (4), conducting mass media campaigns to discourage tobacco use (1), and eliminating or severely restricting all forms of tobacco product advertising and promotion to which young persons are likely to be exposed (4).

Friday

August 11, 1995

Part V

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 801, et al.

Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents; Proposed Rule Analysis Regarding FDA's Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products; Notice

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I. Introduction

Approximately 50 million Americans currently smoke cigarettes and another 6 million use smokeless tobacco products.[1] These tobacco products are responsible for more than 400,000 deaths each year due to cancer, respiratory illnesses, heart disease, and other health problems.[2] Cigarettes kill more Americans each year than acquired immune deficiency syndrome (AIDS), alcohol, car accidents, murders, suicides, illegal drugs, and fires combined.[3] On average, smokers who die from a disease caused by smoking lose 12 to 15 years of life because of tobacco use.[4]

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To determine the most appropriate regulatory measures, the agency reviewed the current patterns of use of tobacco products. According to the 1994 Surgeon General's Report, "Preventing Tobacco Use Among Young People: A Report of the Surgeon General" (the 1994 Surgeon General's Report), more than 3 million American adolescents currently smoke cigarettes and an additional 1 million adolescent males use

smokeless tobacco.[7] Every day, another 3,000 young people become regular smokers.[8] U.S. data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely to ever begin.[9] Eighty-two percent of adults who ever smoked had their first cigarette before age 18, and more than half of them had already become regular smokers by that age.[10] Moreover, the younger one beings to smoke, the more likely one is to become a heavy smoker.[11]

Many young tobacco users become addicted to nicotine, a chemical substance in tobacco. Although they believe that they will not become addicted to nicotine or become long-term users of tobacco products, they often find themselves unable to quit smoking.[12] In fact, among smokers aged 12-17 years. 70 percent already regret their decision to smoke and 66 percent state that they want to quit.[13] Those who are able to quit experience relapse rates and withdrawal symptoms similar to those reported in adults.[14]

Long-term addiction to nicotine can result in serious chronic diseases and premature death. An adolescent whose cigarette use continues into adulthood increases his or her risk of dying from cancer, cardiovascular disease, or lung disease.[15] In addition, smokeless tobacco use has been linked to oral cancer and other adverse effects.[16]

Although most segments of the American adult population have decreased their use of cigarettes, the prevalence of smoking by young people has failed to decline for more than a decade. Recently, smoking among young people has begun to rise.[17] Between 1991 and 1994, the prevalence of smoking by eighth graders increased 30 percent, from 14.3 percent to 18.6 percent. Among 10th grade students, it increased from 20.8 percent to 25.4 percent and for 12th grade students, it rose from 28.3 percent to 31.2 percent.[18] Between 1985 and 1994, smoking among college freshmen increased from 9 percent to 12.5 percent.[19]

* * * *

Tobacco products are among the most heavily advertised products in the United States.[22] In 1993, the tobacco industry spend a total of $6.2 billion on the advertising, promotion, and marketing of cigarettes and smokeless tobacco. Of that number, 31 percent ($1.9 billion) was spent on advertising and promotional activities; 26 percent ($1.6 billion) was given to retailers in the form of cash allowances or retailer items to facilitate and enhance the sale of tobacco products, and finally, 43 percent ($2.6 billion) was in the form of financial incentives (e.g. coupons, cents off, buy one/get one free, free samples) to consumers.[23]

Tobacco product brand names, logos, and advertising messages are pervasive, appearing on billboards, on buses and trains, in magazines and newspapers, and on clothing and other goods. These ubiquitous images and messages convey to young people that tobacco use is desirable, socially acceptable, safe, healthy, and prevalent in society. One study found that 30 percent of 3 years olds and 91 percent of six year olds associate the "Joe Camel" cartoon figure with cigarettes.[24] Studies also show that most young people buy the most heavily advertised cigarette brands, whereas many adults buy generic or "value category" cigarette brands, which have little or no image advertising.[25]

* * * *

A. Sale and Distribution

The proposed rule would restrict the sale of cigarettes and smokeless tobacco products to individuals age 18 and older. This age restriction is based on the fact that most adult smokers became regular smokers before age 18.

The proposed rule would require retailers to verify the age of persons who wish to buy cigarettes or smokeless tobacco products and would eliminate "impersonal" methods of sale

that do not readily allow age verification, such as mail orders, self-service displays, and vending machines.

The proposed rule would make each manufacturer, distributor, and retailer of tobacco products responsible for complying with the proposed restrictions. Manufacturers would be required to remove all manufacturer-supplied or manufacturer-owned self-service displays, advertising, labeling, and other items that do not conform to the requirements in the proposed rule.

The proposed rule would prohibit the distribution of free samples and would allow the exchange of coupons and other non-cash certificates only by individuals 18 or older and only in face-to-face transactions. Currently, young people, including children in elementary school, are often able to obtain free samples despite industry-imposed age restrictions on such distributions.

The proposed rule would also prohibit the sale of single cigarettes ("loosies") and "kiddie packs (less than 20 to a pack) which, due to their relatively low price and easy concealment, have been shown to be particularly appealing to children and adolescents.

Further, the proposed rule would prohibit manufacturers from using a trade name or brand name of a non-tobacco product for a cigarette or smokeless tobacco product. This will prevent a manufacturer from transferring the images, good will, and appeal of a popular non-tobacco product to a tobacco product.

* * * *

II. Cigarette and Smokeless Tobacco Product Use Among Children and Adolescents

Each year, the cigarette industry loses about 1.7 million customers in the United States; about 400,000 die from diseases caused by their smoking and another 1.3 million quit

smoking.[1] To offset the sales lost to smokers who die or quit smoking, cigarette manufacturers rely on young people as the primary source of new customers. Each day, approximately 3,000 young people become regular smokers,[2] serving as the industry's major domestic source of replacement smokers.

* * * *

The long-term downward trend in adult smoking contrasts with the trends in smoking among young people. The Institute of Medicine notes that the number of high school seniors who have smoked in the last 30 days remained "basically unchanged since 1980," at approximately 30 percent, and further reported that 16.7 percent of 8th grade students were current smokers (that is, had smoked within the past 30 days), and 8.3 percent smoked daily.[9] The prevalence of cigarette smoking in recent years among 8th and 10th grade students has risen significantly and provides cause for great concern. For example, among 8th grade students, 14.3 percent in 1991 and 18.6 percent in 1994 were current smokers; among 10th grade students, 20.8 percent in 1991 and 25.4 percent in 1994 were current smokers.[10]

* * * *

Approximately 3 million children under the age of 18 are daily smokers.[15]

* * * *

In 1970, the prevalence of snuff use among males was lowest in those 17 to 19 years of age and the highest use was by men aged 50 or more. By 1985, a dramatic shift had occurred, and males between 16 and 19 were twice as likely to use snuff as men aged 50 and over.[22]

* * * *

The recent and very large increase in the use of smokeless tobacco products by young people and the addictive nature of

these products has persuaded the agency that these products must be included in any regulatory approach that is designed to help prevent future generations of young people from becoming addicted to nicotine-containing tobacco products.

B. The Health Effects Associated With Cigarettes and Smokeless Tobacco Products

Over 400,000 Americans die each year from smoking-related illnesses. This equates to more than one of every five deaths in the United States.[31] If an adolescent's tobacco use continues for a lifetime, there is a 50 percent chance that the person will die prematurely as a direct result of smoking."[32] Moreover, the earlier a young person' smoking habit begins, the more likely he or she will become a heavy smoker and therefore suffer a greater risk of smoking related diseases.[33] Smoking is responsible for about 30 percent of all cancer deaths,[34] including 87 percent of all lung cancer deaths; 82 percent of deaths from chronic obstructive pulmonary disease (COPD);[35] 21 percent of deaths from coronary heart disease;[36] and 18 percent of deaths from stroke.[37] Further, a causal relationship exists between cigarette smoking and cancers of the larynx, mouth, esophagus, and bladder; and atherosclerotic peripheral vascular disease, cerebrovascular disease (stroke), and low-birth weight babies.[38] Cigarette smoking is also a probable cause of infertility and peptic ulcer disease and contributes to, or is associated with, cancers of the pancreas, kidney, cervix, and stomach.[39]

* * * *

2. Health Effects of Smokeless Tobacco Products

Smokeless tobacco use can cause oral cancer.[90] The risk of oral cancer increases with increased exposures to smokeless tobacco products, particularly in those areas of the mouth where smokeless tobacco products are used.[91] The risk of cheek and gum cancers is nearly 50 times greater in long-term snuff users than in nonusers.[92] Snuff and chewing tobacco

contain potent carcinogens, including nitrosamines, polynuclear aromatic hydrocarbons, and radioactive polonium.[93]

* * * *

Smokeless tobacco use causes oral cancer and oral leukoplakia and may be associated with an increased risk of cancer of the esophagus.

* * * *

2. Advertising, Labeling, and Adolescents

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Adolescents view cigarettes as a symbol to be used in helping to create a desired self image and to communicate that image to others. Cigarette advertising reinforces this symbolism and links smoking to success, social acceptance, sophistication, and a desirable lifestyle. The rugged and masculine Marlboro Man conveying, in the words of the Chief Executive Officer and President of Philip Morris, "elements of adventure, freedom, being in charge of your own destiny,"[109] and the cool Joe Camel, giving humorous dating tips, provide imagery that adolescents can accept as identifying badges. Not surprisingly, these brands are among the most popular with young people.

* * * *

With regard to smokeless tobacco products, the U.S. Tobacco Company (UST) successfully revived a declining market by targeting young people, especially young men, in its promotion and advertising. In 1970, the segment of the population with the highest use of these products was men over age 50, and young males were among the lowest. Fifteen years later, there had been a 10-fold increase in the use of smokeless tobacco products among young males, whose use was double that of men over age 50.[127]

* * * *

4. Empirical Research on the Effects of Cigarette Advertising Activities on Young People

* * * *

a. *Studies of advertising recall, approval of advertising, and young people's response to advertising.* Many studies have shown that young people are aware of, respond favorably to, and are influenced by cigarette advertising.[149] Even relatively young children are aware of cigarette advertisements and can recall salient portions. A recent Gallup survey found that 87 percent of adolescents surveyed could recall seeing one or more tobacco advertisements and that half could identify the brand name associated with one of our popular cigarette slogans.[150] One study found that over 34 percent of 12- to 13-year old California children surveyed could name a brand of cigarettes that was advertised, despite the fact that Federal law bans cigarette and smokeless tobacco product advertising on both radio and television, the usual medium of information for children and adolescents.[151]

* * * *

Other studies relating children's misperceptions about the prevalence of smoking to advertising exposure and smoking status have found that overestimating smoking prevalence appears to be a very strong predictor of smoking initiation and progression to regular smoking.[158] The 1994 Surgeon General's Report found that young people overestimate the prevalence of cigarette[159] smoking and that advertising's pervasiveness plays a role in this misconception.

* * * *

Overestimating smoking prevalence, as well as self-reported exposure to advertising, have both been positively correlated with the intention to smoke.[162]

Additional evidence indicates that children smoke many fewer brands than adults and that their choices, unlike adults,

are directly related to the amount and kind of advertising.[163] CDC recently reported that 86 percent of underage smokers who purchase their own cigarettes purchase one of three brands: Marlboro (60 percent), Camel (13.3 percent) and Newport (12.7 percent).[164] These three brands were also the three most heavily advertised brands in 1993.[165] While Marlboro has long been the most popular brand among young people, Camel's share of the youth market increased from around 3 percent to 13.3 percent as a result of the invigorated Joe Camel campaign.

* * * *

b. *The effect of selected advertising campaigns, which were effective with children.*

* * * *

One study explored the power of the Joe Camel campaign to penetrate the youth market. The study found that children as young as 3 years old could identify Joe Camel as a symbol for smoking. This recognition ranged from 30 percent of 3 year olds, to 91 percent of 6 year olds. In fact, the recognition rates for Joe Camel surpassed the rates for certain children's products, cereals, computers, and network television symbols.[168] A similar study funded by R.J. Reynolds found that 72 percent of 6 year olds and 52 percent of children between the ages of 3 and 6 could identify Joe Camel. These rates exceeded the recognition rates for Ronald McDonald, which were 62 percent of the 6 year olds and 51 percent of children between the ages of 3 and 6.[169] The higher recognition rates for Joe Camel are remarkable because, unlike Ronald McDonald who appears in television commercials during children's viewing hours, Federal law prohibits cigarette advertisements on television.

Data collected by researchers for the State of California found that in 1990, 23.1 percent of the under age 18 market in California purchased Camel as their brand. This represented a

230 percent increase over its pre-"Joe Camel" 1986 rate. The same growth rate did not occur for adults.[170] Nationally, Camel had less than 3 percent of the youth market before the brand was repositioned in 1988 and Joe Camel was introduced.[171] By 1989, Camel's share of the youth market had risen to 8.1 percent,[172] and by 1992, 13 to 16 percent.[173] During this same period, Camel's share of the adult market barely moved from its 4 percent level.[174]

The other American study used data from the National Health Interview Survey to study trends in smoking initiation among 10- to 20-year olds from 1944 through 1980. The study found that initiation rates for 18- to 20-year-old women peaked in the early 1960's and steadily declined thereafter. Initiation rates for girls under 18, however, increased abruptly around 1967. This was the same period when brands specifically intended for women were introduced and heavily advertised. The initiation rate was particularly steep for women who did not attend college. The initiation rate for girls under the age of 18 peaked in 1973 -- about the same time that sales for these brands (Virginia Slims, Silva Thins, and Eve) peaked. Between 1967 and 1973, smoking initiation rates increased around 110 percent for 12-year old girls, 55 percent for 13-year olds, 70 percent for 14-year olds, 75 percent for 15-year olds, 55 percent for 16-year olds, and 35 percent for 17-year olds.[175]

* * * *

5. Summary of Evidence

The agency concludes that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: (1) A causal relationship between advertising and youth smoking behavior, and (2) a positive effect of stringent advertising measures on smoking rates and on youth smoking. Moreover, industry statements indicated the importance of the youth market segment to the industry's continued success.

Actions taken by industry members to attract young smokers have also resulted in attracting children and adolescents. Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption. Therefore, the agency finds that stringent restrictions on advertising are essential if smoking by adolescents is to be reduced.

* * * *

3. Reduced Incidence of New Young Tobacco Users

Each year, an estimated 1 million youngsters become new smokers. The proposed regulation targets this group by restricting youth access to tobacco products and by limiting advertising activities that affect adolescents. Several communities have demonstrated that access restrictions are extremely effective when vigorously applied. Woodridge, IL, for example, achieved a compliance rate of over 95 percent. Moreover, 2 years after that law was enacted, a survey of 12 to 14 year-old students indicated that overall smoking rates were down by over 50 percent (over ⅔ for regular smokers).[14]

* * * *

The proposed advertising and promotional restrictions would augment these efforts to limit the attraction of tobacco products to underage consumers. As discussed in detail in the preamble above, no one study has definitively quantified the precise impact of advertising or of advertising restrictions. Nevertheless, the majority of the relevant research indicates that advertising restrictions would reduce consumer demand. For example, according to the 1989 report of the Surgeon General, "The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and logical evidence makes it more likely than not that advertising and promotional activities do

stimulate cigarette consumption."[15] Similarly, after a careful examination of available studies, Clive Smee, Chief Economic Adviser to the UK Department of Health determined that, "the balance of evidence thus supports the conclusion that advertising does have a positive effect on consumption."[16]

* * * *

August 28, 1996

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 801, et al.

Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Final Rule

* * * *

To effectively address the death and disease caused by tobacco products, addiction to cigarettes and smokeless tobacco must be eliminated or substantially reduced. The evidence demonstrates that this can be achieved only by preventing children and adolescents from starting to use tobacco. Most people who suffer the adverse health consequences of using cigarettes and smokeless tobacco begin their use before they reach the age of 18, an age when they are not prepared for, or equipped to, make a decision that, for many, will have lifelong consequences. These young people do not fully understand the serious health risks of these products or do not believe that those risks apply to them. They are also very impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the tobacco industry, techniques that associate the use of tobacco products with excitement, glamour, and independence. When cigarette and smokeless tobacco use by children and adolescents results in addiction, as it so often does, these youths lose their freedom to choose whether or not to use the products as adults.

* * * *

An adolescent whose cigarette use continues into adulthood increases his or her risk of dying from cancer, cardiovascular disease, or lung disease.[15] Moreover, the earlier a young person's smoking habit begins, the more likely he or

she will become a heavy smoker and therefore suffer a greater risk of diseases caused by smoking.[16] Approximately one out of every three young people who became regular smokers each day will die prematurely as a result.[17]

Similar problems exist with underage use of smokeless tobacco. As stated in the 1995 proposed rule, the market for smokeless tobacco has shifted dramatically toward young people since 1970 (60 FR 41314 at 41317). School-based surveys in 1991 estimated that 19.2 percent of 9th to 12th-grade boys use smokeless tobacco.[18] Among high school seniors who had ever tried smokeless tobacco, 73 percent did so by the 9th grade.[19]

As long as children and adolescents become addicted to cigarette and smokeless tobacco use in these numbers, there is little chance that society will be able reduce the toll of tobacco-related illnesses. If, however, the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely to ever begin.[20]

* * * *

Evidence in the administrative record demonstrates that the most effective way to achieve such a reduction is by limiting the access to, and attractiveness of, cigarettes and smokeless tobacco to young people.

* * * *

E. Definitions (§897.3)

Proposed §897.3 would have contained definitions for the terms "cigarette," "cigarette tobacco," "distributor," "manufacturer," "nicotine," "package," "point of sale," "retailer," and "smokeless tobacco." The agency received several comments on the definition section of the proposal, regarding either the specific definitions provided or requesting

definitions for additional terms. In response to the comments, the agency has clarified several terms, including "distributor" and "retailer," and has modified the term "cigarette" to exclude little cigars.

Proposed §897.3(a)(3) would have provided a definition of "cigarette" which included the following language, modeled after the definition of "little cigar" contained in the Cigarette act:

(a) Cigarette means * * *

(3) [a]ny roll of tobacco wrapped in leaf tobacco or any substance containing tobacco * * * and as to which 1,000 units weigh not more that 3 pounds.

(20) Several comments supported the inclusion of "little cigars" in the definition of "cigarette" and suggested that the definition be broadened to include other tobacco products as well. These comments argued that all tobacco, including "snuff," chewing tobacco, cigars, and pipes, should be regulated in the same manner as cigarettes, as these products are also nicotine delivery systems. These comments further stated that there is evidence to show that cigar smoking is becoming increasingly popular among young adults and adolescents.

In contrast, several comments from industry indicated that little cigars are unique products which should not be regulated as cigarettes. One comment stated that the agency has no studies to support the inclusion of little cigars in the rule. Moreover, the U.S. Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) submitted a comment opposing the inclusion of little cigars in the "cigarette" definition, as this would require little cigars to be labeled and advertised as a cigarette under the FDA regulations, but taxed and labeled as a "cigar," under the Internal Revenue regulations enforced by BATF.

The agency has decided, based upon the comments and the record of this proceeding, not to include little cigars in the definition of "cigarettes" for the purposes of the regulation. The differences between little cigars and cigarettes are significant—the products are easily distinguishable, taxed at different levels, and marketed to different consumers. Moreover, little cigars are neither advertised extensively nor sold in vending machines. Most importantly, the agency is not currently aware of sufficient evidence of use of little cigars by children or adolescents to support inclusion of such products in the rule. Therefore, FDA has deleted little cigars from the definition of "cigarette" in §897.3(a). Moreover, FDA will continue to coordinate definitions with BATF as appropriate.

* * * *

VI. Advertising

A. Subpart D—Restrictions on Advertising and Labeling Tobacco Products

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The purpose of the advertising regulations is to decrease young people's use of tobacco products by ensuring that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people.

* * * *

B. The Need for Advertising Restrictions

In the preamble to the proposed 1995 rule, FDA tentatively asserted that a preponderance of the quantitative and qualitative studies of cigarette advertising suggested: (1) A causal relationship between tobacco advertising and tobacco use by young people, and (2) a positive effect of stringent advertising measures on smoking rates and on youth tobacco use. In arriving at this tentative finding, FDA relied heavily on

the National Academy of Sciences Institute of Medicine's (IOM's) Report entitled *Growing Up Tobacco Free, Preventing Nicotine Addiction in Children and Youths*, Washington, DC 1994 (the IOM Report) and the Department of Health and Human Services' (DHHS') Center for Disease Control and Prevention's (CDC's) Report entitled *Preventing Tobacco Use Among Young People, A Report of the Surgeon General* (1994) (1994 SGR). Both indicated that advertising was an important factor in young people's tobacco use, and that restrictions on advertising must be part of any meaningful approach to reducing smoking and smokeless tobacco use among young people. In addition, FDA was careful to note that industry statements and actions and examples of youth oriented advertising and marketing campaigns lent support to the agency's findings.

FDA's review and consideration of the comments received has led the agency to conclude that advertising plays a material role in the decision by those under 18 to use tobacco products.

* * * *

D. Evidence Supporting FDA's Advertising Restrictions

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FDA agrees that none of these studies individually is sufficient to: (1) Establish that advertising has an effect of directly causing minors to use tobacco products; (2) determine directionality—that is, did advertising cause the observed effect, or are smokers more observant of advertising (the Klitzner, Aitken, et al., and Alexander studies attempted to control for this effect); or (3) define terms or disprove the influence of peer pressure in smoking behavior.

However, none of these defects is sufficient to render it inappropriate for FDA to use the studies as evidence. The studies, in fact, present useful insight into how advertising affects smoking behavior and when considered with other

studies provide sufficient support for the agency's conclusion. For example, one study [101] stated that the results show that part of the process of becoming a smoker is to adopt a preferred brand, which the advertising and tobacco industries concede is affected by advertising. Moreover, these studies clearly indicate that, at a minimum, advertising plays an important role in developing an appealing and memorable image for brands. Finally, FDA recognizes that advertising may not be the most important factor in a child's decision to smoke; however, the studies cited by the agency establish that it is a substantial, contributing, and therefore material, factor.

* * * *

It should also be noted that the apparent focus on the possible causal role of cigarette and smokeless tobacco advertising in young people's *initial* decision to smoke or to use smokeless tobacco is overly narrow. Human behavior cannot be modeled so simplistically. In point of fact, tobacco advertising has an effect on young people's tobacco use behavior if it affects initiation, maintenance, or attempts at quitting.

The evidence that FDA has gathered in this proceeding establishes that cigarette and smokeless tobacco advertising does have such an effect. While not all the evidence in the record supports this conclusion, there is more than adequate evidence, that when considered together, supports a conclusion that advertising, with the knowledge of the industry, does affect the smoking behavior and tobacco use of people under the age of 18. This behavior includes the decision whether to start using cigarettes or smokeless tobacco, whether to continue using or to increase ones consumption, when and where it is proper to use tobacco, and whether to quit. This evidence includes:

Expert Opinion - The American Psychological Association provided expert opinion, with specific citation to numerous

studies, to show that tobacco advertising plays directly to the factors that are central to children and adolescents and thus plays an important role in their decision to use tobacco. (See section VI.D.4.a. of this document; and 60 FR 41314 at 41329.)

Advertising Theory - Basic advertising and consumer psychology theory, statements from advertising experts, and general consumer testing show that advertising that is multi-media, that uses color, and that employs more pictures, characters, or cartoons as opposed to text is more robust and can be better processed, understood and remembered by children and adolescents, who have less information processing ability than adults. (See section VI.B1. and VI.B2 of this document.)

Studies and Surveys - Studies show that children are exposed to substantial and unavoidable advertising, that exposure to tobacco advertising leads to favorable beliefs about tobacco use, that advertising plays a role in leading young people to overestimate the prevalence of tobacco use, and that these factors are related to young people's tobacco initiation and use. (See sections VI.D.3.a., VI.D.3.b., and VI.D.3.c. of this document.)

Empirical Studies - Studies conducted on sales data have shown that advertising did increase one segment of the tobacco market (low tar cigarettes), that advertising in New Zealand had the effect of increasing tobacco sales to young people, and that a large multi-country survey showed that advertising tends to increase consumption of tobacco products. (See 60 FR 41314 at 41333 through 41334; sections VI.D.3.g., VI.D.4.c., and VI.D.6.a. of this document)

Anecdotal Evidence, and Various Advertising Campaigns Successful with Young People - Studies show that the buying behavior of young people is influenced by advertising, that they smoke the most advertised brands, that children ages 3 to 6 can

recognize a cartoon character associated with smoking at the same rate as they recognize Ronald McDonald, that various ad campaigns (Camel cigarettes, Reg cigarettes, products designed for women, and smokeless tobacco advertising aimed at new users) that appeared to be targeted to young people did have an effect upon young people's purchases and use of tobacco, and that young people report that they got their information about a tobacco brand from billboards, magazines, in store advertising and on teeshirts (60 FR 41314 at 41329 through 41334; and see sections VI.D.3.d., VI.D.3.e., and VI.D.3.i. of this document).

Industry Statements - Statements in documents created by R.J. Reynolds' researchers, by Philip Morris advertising people, by executives of US Tobacco and by people in and doing work for various Canadian tobacco companies indicate that young people are an important and often crucial segment of the tobacco market.

Consensus Reports - The IOM and 1994 SGR concluded on the basis of an exhaustive review of the evidence that advertising affects young people's perceptions of the pervasiveness, image and function of smoking, that misperceptions in these areas constitute psychosocial risk factors for the initiation of tobacco use, and thus advertising appears to increase young people's risk of tobacco use.

* * * *

Thus, the evidence in this proceeding demonstrates that cigarette and smokeless tobacco advertising plays a material role in the decision of children and adolescents under the age of 18 to engage in tobacco use behavior. It therefore establishes that the harm from this advertising is real.

* * * *

FDA agrees with those comments that expressed the view that labeling the tobacco market as a "mature market" is a

simplistic denotation, which fails to recognize the movement into the market each day of new young smokers often motivated in part by advertising. Even "mature" markets must replenish their customer base as older consumers leave the market. In fact, approximately one million new young smokers enter the tobacco market each year. These new smokers are necessary to keep the mature market stable and to prevent decline. There is no evidence to suggest that these new smokers are predestined[182] to enter the market. RJR acknowledged this in one marketing memo,

> "[I]f we are to attract the nonsmoker or the presmoker, there is nothing in this type of product that he would currently understand or desire. * * * Instead, we somehow must convince him with wholly irrational reasons that he should try smoking."[183]

They must be influenced by peers, parents, and advertising, either to join the market or to decline to enter.

The agency finds that regardless of whether marketers and their advertising agencies intentionally target children and adolescents, young people are still affected by advertising. Children are not isolated from tobacco advertising's attractiveness or inducements. There is no "magic curtain around children and teenagers who seek to learn how to fit into the adult world," nor is there any evidence to support a claim that young people are immune from advertising's blandishments.[184]

Comments asserting that tobacco advertising fails to increase consumption for the tobacco market run contrary to the views of one well-known advertising executive who stated:

I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every other product, somehow miraculously fails to work for tobacco products.[185]

Further, the view that advertising does not affect consumption is contradicted by industry experience, logic, and evidence. It does not appear credible that the industry spends more than $6 billion annually merely to maintain brand share and to try to switch current smokers; this argument defies common sense. The economics of this argument are strained - five manufacturers control almost 100 percent of the market, and three of these have approximately 90 percent of the market.[186]

* * * *

In addition to logic, there is empirical evidence that advertising can expand demand in a so-called mature market and in fact has done so in the cigarette market before. Smoking rates for teenage girls rose from 8.4 percent in 1968, when major promotional campaigns first targeted women, to 15.3 percent in 1974, by which time other tobacco companies had also begun marketing women's brands.[188] The same phenomenon was captured differently in a recent study[189] that tracked initiation rates for girls and women over a 40-year period. The study found that smoking initiation rates rose for girls under 18 during the period between 1967 and 1973 (women's targeting period), even though initiation rates did not rise for women 18 and older. Finally, as detailed more fully in the preamble to the 1995 proposed rule (60 FR 41314 at 41345), another study looked at the effect of variations in advertising expenditures for low tar cigarettes. Although the advertising did not increase the advertiser's brand share, increased advertising for low tar cigarettes caused the entire market for cigarettes to increase.[190]

* * * *

Finally, even the industry acknowledges that young people are a strategically important audience because brand loyalty often develops during this period of trying cigarettes and becoming a smoker. In 1973, RJR's research and development

officer wrote "Realistically, if our Company is to survive and prosper over the long term, we must get our share of the youth market."[194] And, as noted in the preamble of the 1995 proposed rule, these words reflect those uttered by the Canadian sister company of the American tobacco company, Brown and Williamson Tobacco Corp.

If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers.[195]

FDA finds that there is no merit to the industry's claim that because the tobacco market is a mature market, advertising does not stimulate demand but only reallocates the existing market between companies. Not only is the industry's argument overly simplistic, but, as shown, advertising plays an important role in creating new customers, including young people. FDA shares the incredulity expressed by the court in *Dunagin*, 718 F.2d at 750, regarding this argument: "It is beyond our ability to understand" why an industry would spend billions a year merely to acquire market share at the expense of its competitors, when it has a much harder job of convincing young people to start a habit that is neither easy to acquire nor pleasant.

* * * *

5. Section 897.30(b) - Billboards

The agency proposed in § 897.30(b) to prohibit outdoor advertising, including but not limited to billboards, posters, or placards, placed within 1,000 feet of any public playground or playground in a public park, elementary school, or secondary school. FDA proposed this provision because these are places where children and adolescents spend a great deal of time and should therefore be free of advertising for these products. The agency tentatively concluded that this was a reasonable restriction and noted that the cigarette industry's voluntary "Cigarette Advertising and Promotion Code," (the Code)

revised in 1990, contains a similar provision concerning schools and playgrounds (60 FR 41314 at 41334 through 41335).

* * * *

Moreover, the agency also disagrees that it has no basis for including other outdoor signage, including signs on stores, in the regulation. The agency provided evidence in the administrative record and comments refer to evidence,[203] which showed that in a test area, those stores within 1,000 feet of schools had a significantly greater percentage of windows covered with tobacco signs than those further away. Moreover, the two RJR memoranda by sales representatives, described in section VI.D.3.d. of this document, mention the importance of supplying stores near high schools with "young adult" material.

This provides sufficient support for the agency's concern with signage on stores near schools. Young people are more likely to frequent stores near schools, especially older adolescents, and these venues should therefore be free of advertising for tobacco products.

* * * *

The agency is aware that the Code of Advertising Practices has not been uniformly observed, as several comments pointed out. Moreover, the industry code is significantly less inclusive than the proposed regulation as it covers only billboard advertising and not other forms of outdoor advertising such as posters and placards. These other forms are likely to be placed near retail establishments and in some cases, according to comments, have appeared on school fences. The agency finds that all outdoor advertising must be included in the regulation in order to provide comprehensive coverage. There is little difference between a billboard and a large poster to a child. Both are advertisements, and both are visible, so that children see them as they go to and from school and play.

In addition, the Code prohibits outdoor advertising only within 500 feet of schools, an area only a block or a block and a half from the school (there are 10 to 12 city blocks to a mile). One block will not provide sufficient protection as it would not cover the areas where many children congregate with their friends. Moreover, a child's vision does not stop at one block from school. A prohibition of 1,000 feet will ensure the absence of signs for 2 to 3 blocks from a school or playground which can be seen from these locations where children spend a significant amount of time each day.

* * * *

Billboards near schools and playgrounds ensure that children are exposed to their messages for a prolonged period of time. As the Supreme Court recognized in *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1934), billboards are seen without the exercise of choice or volition, and viewers have the message thrust upon them by all the arts and devices that skill can produce. This is particularly true of billboards that are readily visible (i.e. within 1,000 feet) when children play or study at a playground or school, places where by design children spend a lot of time, or when children walk to and from a school or playground. Confronted daily and unavoidably with the advertised message, even in text-only, a child gets a sense of familiarity, normalcy and acceptability of the message and the product that is advertised.

* * * * *

The 1,000-foot restriction on outdoor advertising will serve to remove what has been shown is an effective means for tobacco companies to communicate with young people in a direct and unavoidable manner. Eliminating such billboards will thus mean eliminating a means by which the industry has influenced young people to engage in tobacco use behavior.

Therefore, the agency concludes that § 897.30(b) is a necessary part of its effort to reduce underage use of tobacco products.

* * * *

[1998]

SMOKING AND TOBACCO CONTROL

MONOGRAPH 9

National Institute of Health
National Cancer Institute

Cigars Health Effects and Trends

* * * *

Cigar Smoking: Overview and Current State of the Science

David M. Burns

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TRENDS IN CONSUMPTION

Since 1993, cigar sales in the U.S. have increased by almost 50%, with the largest increase occurring in sales of large cigars (USDA 1997).

* * * *

Marketing approaches to cigar sales linking cigar smoking to wealth and success as portrayed in magazines such as *Cigar Aficionado*, and utilizing events such as cigar nights at popular restaurants, gained widespread prominence beginning in 1992. Sales of cigars, particularly large cigars, have increased substantially since that time. Accompanying this marketing has been the suggestion that cigars particularly premium cigars, have minimal if any disease risk associated with their use as long as they are used in "moderation" (Shanken 1997).

* * * *

ADOLESCENT USE

Data on cigar use among adolescents is also alarming (Chapter 2). Few data on past adolescent cigar use are

available, largely because it was a behavior felt to be uncommon enough not to be worthy of examination until recently. However, several recent surveys of adolescents show a substantial fraction of both male and female adolescents who report both ever and current use of cigars (CDC 1997a, Chapter 2). Male cigar smoking prevalence still exceeds that for females among adolescents, but the gender difference is less than for adults. Table 2 presents the prevalence of cigar use among adolescents in Massachusetts by educational grade level, and it is clear that there is a substantial level of cigar use, even prior to high school.

Addiction to nicotine is a process that occurs almost exclusively during adolescence and young adulthood (USDHHS 1994). The age of initiation of cigar smoking, prior to the recent increase in cigar use, was much older than that for cigarette smoking (Chapter 2); and this difference in age of initiation may be partially responsible for the lower addictive potential of cigars, as manifest by the high rate of occasional, as compared to daily, cigar smoking among adults. Now that initiation of cigar smoking is common among adolescents, whatever resistance to addiction is offered by an older age of initiation would be expected to disappear. The reassurance provided by the low rate of daily cigar smoking among adults may be illusionary now that initiation of cigar smoking is extending into those age groups where development of addiction to nicotine is common. Several generations of adolescents have become addicted to tobacco products that allow nicotine to be absorbed through the lung (cigarettes) and to tobacco products that allow nicotine to be absorbed through the oral mucosa (smokeless tobacco). Cigars can deliver nicotine through both of these routes, and large numbers of adolescents are currently being exposed to nicotine through use of cigars. It is premature to conclude that current generations of adolescents who are ingesting nicotine from cigars will not become addicted simply because older generations of cigar

smokers, who began smoking as adults, were less likely to become addicted.

* * * *

Table 2

Prevalence of cigar use in the last year, and all forms of tobacco use in the last 30 days by school grade, Massachusetts, 1996

	Grade						
	6	**7**	**8**	**9**	**10**	**11**	**12**
Past Year Use of Cigars	5.0 (4.2-5.8)	8.3 (6.6-10.0)	20.3 (17.7-22.9)	20.6 (18.1-23.1)	29.6 (26.9-32.3)	31.8 (28.7-34.8)	31.3 (28.2-34.4)
Past 30-Day Use of Cigars	2.0 (1.1-2.9)	4.4 (1.3-7.5)	10.9 (8.9-12.9)	10.4 (8.5-12.3)	16.0 (13.8-18.2)	18.4 (15.9-20.9)	13.4 (11.0-15.8)

MARKETING

Recent marketing efforts have promoted cigars as symbols of a luxuriant and successful lifestyle. Endorsements by celebrities including athletes, elaborate cigar smoking events and the resurgence of cigar smoking in movies have all contributed to the increased visibility of cigar smoking in society and probably have lowered barriers to cigar use in public. Publication of cigar lifestyle magazines such as "Cigar Aficionado", which began in 1992, antedate the increase in cigar consumption which began in 1993.

* * * *

Evaluation of the effects of cigar promotional efforts on adolescent cigar smoking is only just beginning due to the recent nature of this phenomenon, but cigars are not the first tobacco product to be heavily promoted in ways likely to influence adolescent use. Celebrity endorsements by popular heroes, including athletes, were a prominent part of the mass marketing of cigarettes during the first half of this century (Kluger 1996).

* * * *

CONCLUSIONS

1. Cigar use began to increase in the United States after promotional activities for cigars increased beginning in 1992.
2. Promotional activities for cigars have increased the visibility of cigar consumption, normalized cigar use, and broken down barriers to cigar use.
3. Although the use of sex and celebrity to sell cigarettes has been forbidden by the cigarette industry's voluntary code since 1965, these appeals are a regular feature of cigar marketing.

The preparation of this chapter has been supported in part by grants from the Robert Wood Johnson Foundation.

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CONCLUSIONS

1. Regular cigar smoking causes cancer of the lung, oral cavity, larynx, esophagus, and probably cancer of the pancreas.

2. Heavy cigar smokers, and those who inhale deeply, are at increased risk for coronary heart disease and can develop chronic obstructive pulmonary disease (COPD). Data from CPS-I suggest that cigar smokers have an increased risk for aortic aneurysm.

3. On average, cigar smokers are less likely to inhale cigar smoke than are cigarette smokers to inhale cigarette smoke, and this reduced inhalation of tobacco smoke probably explains the lower risks of coronary heart disease, COPD, and lung cancer seen among cigar smokers compared to cigarette smokers.

4. The risks of cancers of the oral cavity, and esophagus are similar among cigarette and cigar smokers, probably due to the similar doses of tobacco smoke delivered to these areas by smoking cigars and cigarettes.

5. Former cigarette smokers who currently smoke cigars are more likely to inhale deeply than cigar smokers who have never smoked cigarettes, and their risks are intermediate between cigarette smokers and cigar smokers who have never smoked cigarettes.

6. Cigarette smokers who switch to smoking only cigars have lung cancer risks that are lower than continuing cigarette smokers, but these risks appear to be substantially greater than those for individuals who have quit smoking all tobbaco products.

* * * *

Marketing and Promotion of Cigars

John Slade

INTRODUCTION

This chapter examines the recent commercial history of cigars in the United States. Sales patterns, advertising, and apparent promotional activities are explored. Most of the discussion of marketing activities is descriptive, since few quantitative data are available. There is almost no publicly available information on how the increased visibility that cigars have achieved since about 1992 has been financed. Accordingly, what are described in this chapter as promotional activities are not necessarily the result of activities by commercial interests. They are, though, activities that have probably contributed to the promotion of cigar consumption.

* * * *

There have been a marked increase in the number of smoke shops since 1992 (Flying High, 1997). The number of retail specialty tobacco outlets has increased from 2,358 in 1992 to 4,948 in 1996. A sign that this increase has drawn in many small businessmen who have not previously been involved in the trade is the publication of an extensive article in a trade magazine about the function of sales representatives (Scott, 1997).

* * * *

Lifestyle magazines

The resurgence of cigar use in the United States has been closely associated with the glossy lifestyle magazine, *Cigar Aficionado*, published by Marvin R. Shanken. Launched in the Fall of 1992, the magazine was targeted for what Shanken asserted was an increasing number of men who enjoy smoking expensive cigars (Shriver, 1992). The publication has grown from 130 pages per issue to more than 400 and has increased its publication frequency from four to six times annually. Its circulation has grown from 40,000 (Conrad, 1996) to 400,119 (*New York Times*, 1997. Each issue promotes cigar use as

part of successful, indulgent living through interviews with celebrities, sport stars, and others. Reviews of expensive cigars are offered as well as lavish descriptions of cigar accessories such as lighters and humidors. The editorial context is how to live life to the fullest in a style reminiscent of Esquire, GQ or Playboy. While advertising for cigars and their perquisites are prominent, sellers of upscale clothing, luxury cars, expensive watches, jewelry, premium liquor, casinos, other resorts, and perfume also feature their goods and services in this publication. Each issue has an article about gambling.

* * * *

Cigar-centered Dining and Entertainment

The current era of fancy cigar dinners and other entertainments focused on cigars seems to have begun around 1988 (Luz, 1997).

From its own beginnings four years later, *Cigar Aficionado* sponsored gala affairs and dinner parties at expensive restaurants featuring cigars, wines, and celebrity guests. Similar events, which build word of mouth advertising, have become widespread, and the magazine publicizes restaurants that offer "smoker nights." In a 1992 issue, there was a list of 32 domestic and 4 foreign restaurants and cigar clubs that offered such events (Smoker Nights, 1992); by Spring 1997, the number of listings had grown to 591 entries in the United States and 70 listings from outside the country (Smoker Nights, 1997). Magazine subscribers receive formal invitations to events sponsored by the magazine; and the magazine regularly features photographs from these events in its pages. The popularity and acceptability of these events is illustrated by the fact that a restaurant at Walt Disney World has hosted cigar dinners (Scott, 1996a).

* * * *

Newspaper stories about cigars

The resurgence in popularity of cigars has been covered, and in part fueled by, articles in newspapers. Among the twenty daily

newspapers indexed by the Dialog data base, there were 325 articles over the seven-year period 1990 - 1996 that dealt with news about cigars or feature stories about their increasing popularity in the culture. Coverage of cigars was fairly constant for the first 5 years of the period, and then showed an abrupt upswing (Table 8). Uncritical stories describing this as a social or as a fashion phenomenon have been common in newspapers as well as on television magazine shows. Much of this coverage was stimulated by a public-relations effort by cigar manufactures intended to promote positive stories in the news media linking cigar use to luxury and power (Klein, 1998).

* * * *

Additional information is needed to better characterize marketing efforts for cigars. Specifically, there should be:

* * * *

- Research to learn the extent to which advertising and promotion for cigars, including things as commonplace as cigar bands, reaches and affects kids.

Massachusetts Attorney General Scott Harshbarger Prepared Remarks Accepting National Tobacco Settlement

November 20, 1998

For some time now, I have been considering whether or not Massachusetts should agree to participate in a proposed national settlement of our tobacco litigation. Although the proposal is not all I had hoped for, I must weigh whether Massachusetts can do best by settling or whether we could achieve more by proceeding to trial.

It has been a tremendous gut-wrenching decision, but I have decided Massachusetts will agree to the terms of the proposed national settlement. I believe this settlement is in the best interest of the people of Massachusetts, and will provide tangible benefits to our state, to our children and to the public health for generations to come.

I believe we cannot do better at trial. In fact, we could do a great deal worse. There are serious limitations on what can be achieved through litigation, and it is important to remember that our lawsuit is one of only one of many weapons available in the war against Big Tobacco.

The benefits for Massachusetts under this agreement, include:

*$7.6 billion in the next 25 years, and roughly $300 million a year every year forever;

*Court-ordered, coast-to-coast restrictions against industry efforts to lure our children into becoming the next generation of tobacco victims through marketing, merchandising, and other means;

*An end to almost all outdoor advertising and mass transit advertising, and to Hollywood promotions that glamorize the use of tobacco products;

*A $1.5 billion national public education foundation to duplicate on a national scale the kind of tobacco counter-advertising that Massachusetts helped pioneer;

*And, a multi-million-dollar national charitable foundation to fight teen smoking and substance abuse, and to conduct research into the reduction of tobacco related disease.

Taken together, these provisions represent more than we could have achieved through trial. They are tangible and hard fought gains our state can begin to enjoy within a few months—instead of speculative benefits we might have been able to secure after a trial and years of inevitable appeals.

In short, if everything in this agreement was the end result of a trial, I would be more than happy to declare victory. That, in the final analysis, is the basis for my decision that accepting is in the best interest of the people of Massachusetts.

That does not mean that this settlement is ideal. It is not.

It is far short of what many of us who have fought this battle had hoped for, including the public health and tobacco control communities. Ideally, we would have liked fewer exceptions to the provisions of this deal. In a perfect world, we would have liked to regulate nicotine as a drug, make Big Tobacco responsible for reducing youth smoking rates, and put bigger and better warning labels on cigarettes.

I have fought hard for years to achieve those goals in local, state and federal forums, including in Congress. But I have to deal with reality and the facts before me, and to make judgments based on what I believe is in the best interests of the people of Massachusetts.

We must remember that this national settlement is an important and historic step forward in the war against Big Tobacco, but it is only the first step that we can and should take as a state and as nation. It certainly should not be used as an excuse to stop fighting for more for our children and for the public health on the local, state or federal level.

The fight must and will go on in Congress, in private lawsuits and in state houses and in communities here and across our nation.

As Attorney General, my overriding goals in our lawsuit have been to make the industry pay for the damage it has done to Massachusetts citizens, to protect our children and to improve the public health. The billions of dollars in this agreement for Massachusetts and the public health concession we have won are major steps toward the fulfillment of those goals.

To make the most of those gains, I am announcing today a proposal that the money won in this settlement be devoted exclusively to four key public health goals in Massachusetts to:

*Expand and improve health coverage for our children;
*Expand access to health care for working families;
*Supplement prescription drug and Medicare coverage for our senior citizens
*And, reduce tobacco use among children and adults, especially in minority and urban communities targeted by Big Tobacco.

I am proposing that a new expert commission composed of state officials and public health leaders be established to make specific, annual recommendations to the Legislature and the governor on how this significant revenue stream can be used in the best interest of the people and the public health of Massachusetts.

I will file specific legislation on these recommendations soon, and I hope the Legislature and the governor will act swiftly on my bill in the upcoming session.

As I said, this was probably one of the toughest decisions I have ever had to make as attorney general. I know that many of my friends in the public health and tobacco control communities will be disappointed.

But it is their rock-solid strength and dedication that helped me get to this point—a landmark that was unimaginable when we filed our longshot lawsuit two years and 11 months ago today. When it comes to issues of tobacco and tobacco control, the commitment of the public health community in Massachusetts is unequalled anywhere in our nation.

I know, beyond the shadow of a doubt, that they will make sure the funds won in this agreement are used to save lives.

I know that they will make their voices heard loud and clear every year when these funds are appropriated.

And I know that they will use their imaginations to make sure every penny is spent to significantly improve quality of life here, individually and collectively, for years to come.

From the bottom of my heart, I want to thank each and every one of them for their advice and counsel over the past few days and during my years as Attorney General. And I want to thank my trial team for their dedication and the magnificent job they have done, against all the odds, in the past three years.

Today, I am also announcing that, before I leave office in January, I will promulgate first-in-the-nation consumer protection regulations that will, among other things, limit the advertising of tobacco products in retail establishments within 1000 feet of schools.

I believe these regulations are absolutely necessary to close holes in the national agreement, and to do what we can to stop Big Tobacco from recruiting new customers among the children of Massachusetts.

And finally, I intend to join President Clinton's call for swift and decisive action on tobacco control by the new Congress, especially federal regulation of nicotine as a drug.

The reality is that in the year and a half since attorneys general first proposed to Congress a national settlement and a national tobacco control strategy, more than 1.5 million children have started smoking and more than a half million of them will die premature deaths as a result.

As a state and as a nation, we cannot and should not rest until we reverse that trend.

This settlement is an important and historic first step toward saving lives, protecting our children and creating a safer and healthier

future for citizens here and across our nation. I believe we have a responsibility to seize this opportunity for this generation and for generations to come.

(end)

OUTLINE OF TERMS FOR MASSACHUSETTS IN NATIONAL TOBACCO SETTLEMENT

OVERALL FINANCIAL TERMS

Massachusetts will receive a total of $7.6 billion in the first 25 years of the agreement, and $323 million a year every year forever beginning in the 26th year of the agreement.

ANNUAL PAYMENTS

After the agreement is finalized, Massachusetts will receive:

*An initial payment of $98 million early in 1999.
*$263 million in the year 2000.
*$284 million in 2001.
*$341 million in 2002.
*$344 million in 2003.
*$287 million in 2004 through 2007.
*$323 million in 2008 and every year thereafter.

USE OF FUNDS

The purposes for which the money could be used will be subject to legislative action. Attorney General Harshbarger is proposing the funds be earmarked to expand and improve health care for children, working adults and senior citizens, as well to reduce tobacco use in urban and minority communities.

PAYMENT PROVISOS

Payment will be adjusted annually based on inflation. The amount of annual payments will be subject to "volume adjustments," meaning that tobacco company payments will rise if cigarette sales increase, and fall if cigarette sales decrease.

MARKET SHARE & NON-PARTICIPATING MANUFACTURERS

If the aggregate market share of all companies participating in the agreement declines by more than 2 percent, their annual payment will be reduced by 3 percent for each percent lost beyond the 2 percent threshold.

This provision would not apply to states that pass legislation that requires non-participating manufacturers to pay money into a special state fund for future claims.

FEDERAL OFFSET

If before Nov. 30, 2002, Congress passes legislation that requires payments by the industry whether by tax or other means, the state's share of funds under this agreement could be reduced dollar for dollar by any portion of the federal funds made available to the state.

AREAS NOT COVERED BY THIS AGREEMENT

The agreement does not contain any restrictions on retailers. It does improve current Food & Drug Administration regulation of tobacco or nicotine. It does not contain so-called "look-back" penalties for industry failure to decrease youth smoking rates over time. It contains no restrictions on print advertising of tobacco products. It contains no improvements to the current health warnings on tobacco products.

YOUTH TARGETING

The agreement prohibits advertising, promotions or marketing that primarily target young people.

CARTOON CHARACTERS

The agreement bans the use of cartoons in the advertising, promotions, packaging, and labeling of tobacco products. It does not ban the use of human images for those purposes.

SPONSORSHIPS

Sponsorship of events with significant youth audiences will be prohibited, along with sponsorships of team sports and events where any participants are underage. For other events, tobacco companies will be limited to one brand name sponsorship per year.

Use of tobacco brand names for the naming of stadiums and arenas will be prohibited. Corporate sponsorships of athletic, musical, cultural, artistic or social events will be allowed as long as the corporate name does not include the brand name of the tobacco product.

OUTDOOR ADVERTISING

The agreement bans all outdoor advertising, including billboards, signs and placards in arenas, stadiums, and shopping malls. It limits advertising outside retail establishments to a size of 14 square feet.

All transit advertising of tobacco products would be banned.

PRODUCT PLACEMENT & THIRD PARTY USE

The agreement will ban payments to promote tobacco products in movies, television shows, theater productions, live or recorded music, performances, videos and video games.

Tobacco companies will be barred from using third parties to promote or advertise brand names in any way prohibited by the agreement.

The agreement also bans future cigarette brands from being named after recognized non-tobacco brand or trade names, or nationally recognized sports teams, entertainment groups or celebrities.

MERCHANDISE

The distribution and sale of apparel and merchandise with brand-name logos will be banned beginning July 1, 1999. Gifts will be banned without proof of age.

FREE SAMPLES & MINIMUM SIZE

Free samples will be restricted to adult-only establishments. Tobacco companies will be prohibited from opposing state legislation that would establish a minimum pack size of 20 until Jan. 1, 2002.

NATIONAL FOUNDATION

The agreement creates a national charitable foundation to reduce teen smoking and substance abuse, and to study ways to reduce tobacco-related disease. The tobacco industry will pay $250 million during the next 10 years to fund the foundation.

NATIONAL PUBLIC EDUCATION FUND

The agreement requires the tobacco industry to pay $1.45 billion during the next five years to create a national public education fund, which will carry out a national advertising and education program to counter youth tobacco use and educate consumers.

LOBBYING & LEGAL RESTRICTIONS

The industry will be barred from launching any new legal challenges against the enforcement or constitutionality of tobacco control laws, ordinances and rules passed prior to June 1, 1998.

The industry will be prohibited from opposing proposed state or local laws or administrative rules intended to limit youth access to and consumption of tobacco products.

The industry will be prohibited from lobbying for the diversion of settlement funds to non-tobacco or non-health related uses, or for legislation intended to eliminate or diminish state rights under the settlement.

RELEASE OF LIABILITY

States signing on to the agreement drop their current claims against the industry, and the industry would drop any current challenges to state litigation. The agreement specifies that states reserve the right to pursue criminal prosecutions based on federal, state or local laws.

The agreement contains no limitations on private suits against the tobacco industry.

FULL DISCLOSURE

The tobacco industry will release internal documents under protective orders in state lawsuits, except for documents subject to privilege and trade secret claims. The industry will be required to maintain for 10 years a Website of all documents produced in state or other health-related lawsuits. This provision also requires creation of a user-friendly index for the site.

CONSPIRACY & MISREPRESENTATIONS

The agreement bars the industry from jointly contracting or conspiring to limit information about the health hazards of their products; limit or suppress research into smoking and health; limit or suppress research into the marketing or development of new products.

The agreement prohibits the tobacco industry from making any material misrepresentations regarding the health consequences of smoking.

DISBANDS TRADE ASSOCIATIONS

The agreement disbands the Council for Tobacco Research, the Tobacco Institute and the Council for Indoor Air Research. It also provides for the regulation and oversight of any new industry trade associations.

ENFORCEMENT

The terms of the agreement will be enforced through a court-ordered consent decree in each state. On March 31, 1999, the industry will be required to pay $50 million into a fund that states will use to enforce and implement the agreement, as well as to investigate and litigate potential violations.

COST RECOVERY & ATTORNEY FEES

Tobacco companies will reimburse the offices of state attorneys general for all reasonable costs, expenses and staff attorney fees up to a total of $150 million nationwide.

The industry will pay outside attorney fees separate from any other financial payments.

Private attorneys can negotiate a "liquidated fee arrangement" that will be paid during a four-year period from a pool of $1.25 billion in industry funds. Private attorneys who accept a liquidated fee must release the state from all claims for attorney fees. If private attorneys reject the liquidated fee or cannot agree to an offer, they can go through arbitration. The industry will pay the arbiter's award, with the timing of the payments determined by funds available under a $500 million per year cap.

MOST FAVORED NATION PROVISION

Any agreement with a non-settling state that has more favorable overall terms will cause the more favorable terms to be passed along to settling states. This provisions does not apply to more favorable economic terms in an agreement reached after a jury is seated or a trial begins.

(end)

[Signed Nov. 23, 1998]

MASTER SETTLEMENT AGREEMENT

* * * *

(ii) "Outdoor Advertising" means (1) billboards, (2) signs and placards in arenas, stadiums, shopping malls and Video Game Arcades (whether any of the foregoing are open air or enclosed) (but not including any such sign or placard located in an Adult-Only Facility), and (3) any other advertisements placed (A) outdoors, or (B) on the inside surface of a window facing outward. Provided, however, that the term "Outdoor Advertising" does not mean (1) an advertisement on the outside of a Tobacco Product manufacturing facility; (2) an individual advertisement that does not occupy an area larger than 14 square feet (and that neither is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet, nor functions solely as a segment of a larger advertising unit or series), and that is placed (A) on the outside of any retail establishment that sells Tobacco Products (other than solely through a vending machine), (B) outside (but on the property of) any such establishment, or (C) on the inside surface of a window facing outward in any such establishment; (3) an advertisement inside a retail establishment that sells Tobacco Products (other than solely through a vending machine) that is not placed on the inside surface of a window facing outward; or (4) an outdoor advertisement at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

* * * *

(xx) "Transit Advertisements" means advertising on or within private or public vehicles and all advertisements placed at, on or within any bus stop, taxi stand, transportation waiting area, train station, airport or any similar location. Notwithstanding the

foregoing, the term "Transit Advertisement" does not include (1) any advertisement placed in, on or outside the premises of any retail establishment that sells Tobacco Products (other than solely through a vending machine) (except if such individual advertisement (A) occupies an area larger than 14 square feet; (B) is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet; or (C) functions solely as a segment of a larger advertising unit or series); or (2) advertising at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

* * * *

III. PERMANENT RELIEF

(a) Prohibition on Youth Targeting. No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

(b) Ban on Use of Cartoons. Beginning 180 days after the MSA Execution Date, no Participating Manufacturer may use or cause to be used any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products.

(c) Limitation of tobacco Brand Name Sponsorships.

(1) Prohibited Sponsorships. After the MSA Execution Date, no Participating Manufacturer may engage in any Brand Name Sponsorship in any State consisting of:

(A) concerts; or

(B) events in which the intended audience is comprised of a significant percentage of Youth; or

(C) events in which any paid participants or contestants are Youth; or

(D) any athletic event between opposing teams in any football, basketball, baseball, soccer or hockey league.

(2) Limited Sponsorships.

(A) No Participating Manufacturer may engage in more than one Brand Name Sponsorship in the States in any twelve-month period (such period measured from the date of the initial sponsored event).

(B) Provided, however, that

(i) nothing contained in subsection (2)(A) above shall require a Participating Manufacturer to breach or terminate any sponsorship contract in existence as of August 1, 1998 (until the earlier of (x) the current term of any existing contract, without regard to any renewal or option that may be exercised by such Participating Manufacturer or (y) three years after the MSA Execution Date); and

(ii) notwithstanding subsection (1)(A) above, Brown & Williamson Tobacco Corporation may sponsor either the CPC country music festival or the Kool jazz festival as its one annual Brand Name Sponsorship permitted pursuant to subsection (2)(A) as well as one Brand Name Sponsorship permitted pursuant to subsection (2)(B)(i).

(3) Related Sponsorship Restrictions. With respect to any Brand Name Sponsorship permitted under this subsection (c):

(A) advertising of the Brand Name Sponsorship event shall not advertise any Tobacco Product (other

than by using the Brand Name to identify such Brand Name Sponsorship event);

(B) no Participating Manufacturer may refer to a Brand Name sponsorship event or to a celebrity or other person in such an event in its advertising of a Tobacco Product;

(C) nothing contained in the provisions of subsection III(e) of this Agreement shall apply to actions taken by any Participating Manufacturer in connection with a Brand Name Sponsorship permitted pursuant to the provisions of subsections (2)(A) and (2)(B)(i); the Brand Name Sponsorship permitted by subsection (2)(B)(ii) shall be subject to the restrictions of subsection III(e) except that such restrictions shall not prohibit use of the Brand Name to identify the Brand Name Sponsorship;

(D) nothing contained in the provisions of subsections III(f) and III(i) shall apply to apparel or other merchandise: (i) marketed, distributed, offered, sold, or licensed at the site of a Brand Name Sponsorship permitted pursuant to subsections (2)(A) or (2)(B)(i) by the person to which the relevant Participating Manufacturer has provided payment in exchange for the use of the relevant Brand Name in the Brand Name Sponsorship or a third-party that does not receive payment from the relevant Participating Manufacturer (or any Affiliate of such Participating Manufacturer) in connection with the marketing, distribution, offer, sale or license of such apparel or other merchandise; or (ii) used at the site of a Brand Name Sponsorship permitted pursuant to subsection (2)(A) or (2)(B)(i) (during such event) that are not distributed (by sale or otherwise) to any member of the general public; and

(E) nothing contained in the provisions of subsection III(d) shall: (i) apply to the use of a Brand Name on a vehicle used in a Brand Name Sponsorship; or (ii) apply to Outdoor Advertising advertising the Brand Name Sponsorship, to the extent that such Outdoor Advertising is placed at the site of a Brand Name Sponsorship no more than 90 days before the start of the initial sponsored event, is removed within 10 days after the end of the last sponsored event, and is not prohibited by subsection (3)(A) above.

(4) Corporate Name Sponsorships. Nothing in this subsection (c) shall prevent a Participating Manufacturer from sponsoring or causing to be sponsored any athletic, musical, artistic, or other social or cultural event, or any entrant, participant or team in such event (or series of events) in the name of the corporation which manufactures Tobacco Products, provided that the corporate name does not include any Brand Name of domestic Tobacco Products.

(5) Naming Rights Prohibition. No Participating Manufacturer may enter into any agreement for the naming rights of any stadium or arena located within a Settling State using a Brand Name, and shall not otherwise cause a stadium or arena located within a Settling State to be named with a Brand Name.

(6) Prohibition on Sponsoring Teams and Leagues. No Participating Manufacturer may enter into any agreement pursuant to which payment is made (or other consideration is provided) by such Participating Manufacturer to any football, basketball, baseball, soccer or hockey league (or any team involved in any such league) in exchange for use of a Brand Name.

(d) Elimination of Outdoor Advertising and Transit Advertisements. Each Participating Manufacturer shall discontinue Outdoor Advertising and Transit Advertisements

advertising Tobacco Products within the Settling States as set forth herein.

(1) Removal. Except as otherwise provided in this section, each Participating Manufacturer shall remove from within the Settling States within 150 days after the MSA Execution Date all of its (A) billboards (to the extent that such billboards constitute Outdoor Advertising) advertising Tobacco Products; (B) signs and placards (to the extent that such signs and placards constitute Outdoor Advertising) advertising Tobacco Products in arenas, stadiums, shopping malls and Video Game Arcades; and (C) Transit Advertisements advertising Tobacco Products.

(2) Prohibition on New Outdoor Advertising and Transit Advertisements. No Participating Manufacturer may, after the MSA Execution Date, place or cause to be placed any new Outdoor Advertising advertising Tobacco Products or new Transit Advertisements advertising Tobacco Products within any Settling State.

(3) Alternative Advertising. With respect to those billboards required to be removed under subsection (1) that are leased (as opposed to owned) by any Participating Manufacturer, the Participating Manufacturer will allow the Attorney General of the Settling State within which such billboards are located to substitute, at the Settling State's option, alternative advertising intended to discourage the use of Tobacco Products by Youth and their exposure to second-hand smoke for the remaining term of the applicable contract (without regard to any renewal or option term that may be exercised by such Participating Manufacturer). The Participating Manufacturer will bear the cost of the lease through the end of such remaining term. Any other costs associated with such alternative advertising will be borne by the Settling State.

(4) Ban on Agreements Inhibiting Anti-Tobacco Advertising. Each Participating Manufacturer agrees that it will not enter into any agreement that prohibits a third party from selling, purchasing or displaying advertising discouraging the use of Tobacco Products or exposure to second-hand smoke. In the event and to the extent that any Participating Manufacturer has entered into an agreement containing any such prohibition, such Participating Manufacturer agrees to waive such prohibition in such agreement.

(5) Designation of Contact Person. Each Participating Manufacturer that has Outdoor Advertising or Transit Advertisements advertising Tobacco Products within a Settling State shall, within 10 days after the MSA Execution Date, provide the Attorney General of such Settling State with the name of a contact person to whom the Settling State may direct inquiries during the time such Outdoor Advertising and Transit Advertisements are being eliminated, and from whom the Settling State may obtain periodic reports as to the progress of their elimination.

(6) Adult-Only Facilities. To the extent that any advertisement advertising Tobacco Products located within an Adult-Only Facility constitutes Outdoor Advertising or a Transit Advertisement, this subsection (d) shall not apply to such advertisement, provided such advertisement is not visible to persons outside such Adult-Only Facility.

(e) Prohibition on Payments Related to Tobacco Products and Media. No Participating Manufacturer may, beginning 30 days after the MSA Execution Date, make, or cause to be made, any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial

film or video, or video game ("Media"); provided, however, that the foregoing prohibition shall not apply to (1) Media where the audience or viewers are within an Adult-Only Facility (provided such Media are not visible to persons outside such Adult-Only Facility); (2) Media not intended for distribution or display to the public; or (3) instructional Media concerning non-conventional cigarettes viewed only by or provided only to smokers who are Adults.

(f) Ban on Tobacco Brand Name Merchandise. Beginning July 1, 1999, no Participating Manufacturer may, within any Settling State, market, distribute, offer, sell, license or cause to be marketed, distributed, offered, sold or licensed (including, without limitation, by catalogue or direct mail), any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name. Provided, however, that nothing in this subsection shall (1) require any Participating Manufacturer to breach or terminate any licensing agreement or other contract in existence as of June 20, 1997 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); (2) prohibit the distribution to any Participating Manufacturer's employee who is not Underage of any item described above that is intended for the personal use of such an employee; (3) require any Participating Manufacturer to retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed, or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer; (4) apply to coupons or other items used by Adults solely in connection with the purchase of Tobacco Products; or (5) apply to apparel or other merchandise used within an Adult-Only Facility that is not distributed (by sale or otherwise) to any member of the general public.

(g) Ban on Youth Access to Free Samples. After the MSA Execution Date, no Participating Manufacturer may, within any Settling State, distribute or cause to be distributed any free samples of Tobacco Products except in an Adult-Only Facility. For purposes of this Agreement, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with (1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products (including, but not limited to, a free offer in connection with the purchase of Tobacco Products, such as a "two-for-one" offer), or (2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

(h) Ban on Gifts to Underage Persons Based on Proofs of Purchase. Beginning one year after the MSA Execution Date, no Participating Manufacturer may provide or cause to be provided to any person without sufficient proof that such person is an Adult any item in exchange for the purchase of Tobacco Products, or the furnishing of credits, proofs-of-purchase, or coupons with respect to such a purchase. For purposes of the preceding sentence only, (1) a driver's license or other government-issued identification (or legible photocopy thereof), the validity of which is certified by the person to whom the item is provided, shall by itself be deemed to be a sufficient form of proof of age; and (2) in the case of items provided (or to be redeemed) at retail establishments, a Participating Manufacturer shall be entitled to rely on verification of proof of age by the retailer, where such retailer is required to obtain verification under applicable federal, state or local law.

(i) Limitation on third-Party Use of Brand Names. After the MSA Execution Date, no Participating Manufacturer may license or otherwise expressly authorize any third party to use or advertise within any Settling State any Brand Name in a manner prohibited by this Agreement if done by such Participating Manufacturer itself. Each Participating Manufacturer shall, within 10 days after the MSA Execution Date, designate a person

(and provide written notice to NAAG of such designation) to whom the Attorney General of any Settling State may provide written notice of any such third-party activity that would be prohibited by this Agreement if done by such Participating Manufacturer itself. Following such written notice, the Participating Manufacturer will promptly take commercially reasonable steps against any such non-de minimis third-party activity. Provided, however, that nothing in this subsection shall require any Participating Manufacturer to (1) breach or terminate any licensing agreement or other contract in existence as of July 1, 1998 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); or (2) retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer.

(j) Ban on Non-tobacco Brand Names. No Participating Manufacturer may, pursuant to any agreement requiring the payment of money or other valuable consideration, use or cause to be used as a brand name of any Tobacco Product any nationally recognized or nationally established brand name or trade name of any non-tobacco item or service or any nationally recognized or nationally established sports team, entertainment group or individual celebrity. Provided, however, that the preceding sentence shall not apply to any Tobacco Product brand name in existence as of July 1, 1998. For the purposes of this subsection, the term "other valuable consideration" shall not include an agreement between two entities who enter into such agreement for the sole purpose of avoiding infringement claims.

(k) Minimum Pack Size of Twenty Cigarettes. No Participating Manufacturer may, beginning 60 days after the MSA Execution Date and through and including December 31, 2001, manufacture or cause to be manufactured for sale in any Settling State any pack or other container of Cigarettes

containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco). No Participating Manufacturer may, beginning 150 days after the MSA Execution Date and through and including December 31, 2001, sell or distribute in any Settling State any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco). Each Participating Manufacturer further agrees that following the MSA Execution Date it shall not oppose, or cause to be opposed (including through any third party or Affiliate), the passage by any Settling State of any legislative proposal or administrative rule applicable to all Tobacco Product Manufacturers and all retailers of Tobacco Products prohibiting the manufacture and sale of any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco).

(l) Corporate Culture Commitments Related to Youth Access and Consumption. Beginning 180 days after the MSA Execution Date each Participating Manufacturer shall:

(1) promulgate or reaffirm corporate principles that express and explain its commitment to comply with the provisions of this Agreement and the reduction of use of Tobacco Products by Youth, and clearly and regularly communicate to its employees and customers its commitment to assist in the reduction of Youth use of Tobacco Products;

(2) designate an executive level manager (and provide written notice to NAAG of such designation) to identify methods to reduce Youth access to, and the incidence of Youth consumption of, tobacco Products; and

(3) encourage its employees to identify additional methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products.

(m) Limitations on Lobbying. Following State-Specific Finality in a Settling State:

(1) No Participating Manufacturer may oppose, or cause to be opposed (including through any third party or Affiliate), the passage by such Settling State (or any political subdivision thereof) of those state or local legislative proposals or administrative rules described in Exhibit F hereto intended by their terms to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products. Provided, however, that the foregoing does not prohibit any Participating Manufacturer from (A) challenging enforcement of, or suing for declaratory or injunctive relief with respect to, any such legislation or rule on any grounds; (B) continuing, after State-Specific Finality in such Settling State, to oppose or cause to be opposed, the passage during the legislative session in which State-Specific Finality in such Settling State occurs of any specific state or local legislative proposals or administrative rules introduced prior to the time of State-Specific Finality in such Settling State; (C) opposing, or causing to be opposed, any excise tax or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers; or (D) opposing, or causing to be opposed, any state or local legislative proposal or administrative rule that also includes measures other than those described in Exhibit F.

(2) Each Participating Manufacturer shall require all of its officers and employees engaged in lobbying activities in such Settling State after State-Specific Finality, contract lobbyists engaged in lobbying activities in such Settling State after State-Specific Finality, and any other third parties who engage in lobbying activities in such Settling State after State-Specific Finality on behalf of such Participating

Manufacturer ("lobbyist" and "lobbying activities" having the meaning such terms have under the law of the Settling State in question) to certify in writing to the Participating Manufacturer that they:

> (A) will not support or oppose any state, local or federal legislation, or seek or oppose any governmental action, on behalf of the Participating Manufacturer without the Participating Manufacturer's express authorization (except where such advance express authorization is not reasonably practicable);

* * * *

[Dated December 3, 1998]

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.	Superior Court Department of the Trial Court
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES, P.L.C., LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., NEW ENGLAND WHOLESALE TOBACCO CO., INC., ALBERT H. NOTINI & SONS, INC., THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and THE TOBACCO INSTITUTE, INC., Defendants.	) Civil Action) No.: 95-7378-J

CONSENT DECREE AND FINAL JUDGMENT

WHEREAS, Plaintiff, the Commonwealth of Massachusetts, commenced this action on December 19, 1995, by and through its Attorney General, Scott Harshbarger, pursuant to his common law

powers and the provisions of the laws of the Commonwealth of Massachusetts;

WHEREAS, the Commonwealth of Massachusetts asserted various claims for monetary, equitable and injunctive relief on behalf of the Commonwealth of Massachusetts against certain tobacco product manufacturers and other defendants;

WHEREAS, Defendants have contested the claims in the Commonwealth's complaint and amended complaint and denied the Commonwealth's allegations and asserted affirmative defenses;

WHEREAS, the parties desire to resolve this action in a manner which appropriately addresses the Commonwealth's public health concerns, while conserving the parties resources, as well as those of the Court, which would otherwise be expended in litigating a matter of this magnitude; and

WHEREAS, the Court has made no determination of any violation of law, this Consent Decree and Final Judgment being entered prior to the taking of any testimony, and without trial or final adjudication of any issue of fact or law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action and over each of the Participating Manufacturers. Venue is proper in this county.

II. DEFINITIONS

The definitions set forth in the Agreement (a copy of which is attached hereto) are incorporated herein by reference.

III. APPLICABILITY

A. This Consent Decree and Final Judgment applies only to the Participating Manufacturers in their corporate capacity acting through their respective successors and assigns, directors, officers,

employees, agents, subsidiaries, divisions, or other internal organizational units of any kind or any other entities acting in concert or participation with them. The remedies, penalties and sanctions that may be imposed or assessed in connection with a violation of this Consent Decree and Final Judgment (or any order issued in connection herewith) shall only apply to the Participating Manufacturers, and shall not be imposed or assessed against any employee, officer or director of any Participating Manufacturer, or against any other person or entity as a consequence of such violation, and there shall be no jurisdiction under this Consent Decree and Final Judgment to do so.

B. This Consent Decree and Final Judgment is not intended to and does not vest standing in any third party with respect to the terms thereof. No portion of this Consent Decree and Final Judgment shall provide any rights to, or be enforceable by, any person or entity other than the Commonwealth of Massachusetts or a Released Party. The Commonwealth of Massachusetts may not assign or otherwise convey any right to enforce any provision of this Consent Decree and Final Judgment.

IV. VOLUNTARY ACT OF THE PARTIES

The parties hereto expressly acknowledge and agree that this Consent Decree and Final Judgment is voluntarily entered into as the result of arm's-length negotiation, and all parties hereto were represented by counsel in deciding to enter into this Consent Decree and Final Judgment.

V. INJUNCTIVE AND OTHER EQUITABLE RELIEF

Each Participating Manufacturer is permanently enjoined from:

A. Taking any action, directly or indirectly, to target Youth within the Commonwealth of Massachusetts in the advertising, promotion or marketing of Tobacco Products, or taking any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within the Commonwealth of Massachusetts.

B. After 180 days after the MSA Execution Date, using or causing to be used within the Commonwealth of Massachusetts any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products.

C. After 30 days after the MSA Execution Date, making or causing to be made any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop within the Commonwealth of Massachusetts any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any Media; provided, however, that the foregoing prohibition shall not apply to (1) Media where the audience or viewers are within an Adult-Only Facility (provided such Media are not visible to persons outside such Adult-Only Facility); (2) Media not intended for distribution or display to the public; (3) instructional Media concerning non-conventional cigarettes viewed only by or provided only to smokers who are Adults; and (4) actions taken by any Participating Manufacturer in connection with a Brand Name Sponsorship permitted pursuant to subsections III(c)(2)(A) and III(c)(2)(B)(i) of the Agreement, and use of a Brand Name to identify a Brand Name Sponsorship permitted by subsection III(c)(2)(B)(ii).

D. Beginning July 1, 1999, marketing, distributing, offering, selling, licensing or causing to be marketed, distributed, offered, sold, or licensed (including, without limitation, by catalogue or direct mail), within the Commonwealth of Massachusetts, any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name. Provided, however, that nothing in this section shall (1) require any Participating Manufacturer to breach or terminate any licensing agreement or other contract in existence as of June 20, 1997 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer; (2) prohibit the distribution to any Participating Manufacturer's employee who is not

Underage of any item described above that is intended for the personal use of such an employee; (3) require any Participating Manufacturer to retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer, (4) apply to coupons or other items used by Adults solely in connection with the purchase of Tobacco Products; (5) apply to apparel or other merchandise used within an Adult-Only Facility that is not distributed (by sale or otherwise) to any member of the general public; or (6) apply to apparel or other merchandise (a) marketed, distributed, offered, sold, or licensed at the site of a Brand Name Sponsorship permitted pursuant to subsection III(c)(2)(A) or III(c)(2)(B)(i) of the Agreement by the person to which the relevant Participating Manufacturer has provided payment in exchange for the use of the relevant Brand Name in the Brand Name Sponsorship or a third-party that does not receive payment from the relevant Participating Manufacturer (or any Affiliate of such Participating Manufacturer) in connection with the marketing, distribution, offer, sale or license of such apparel or other merchandise, or (b) used at the site of a Brand Name Sponsorship permitted pursuant to subsections III(c)(2)(A) or III(c)(2)(B)(i) of the Agreement (during such event) that are not distributed (by sale or otherwise) to any member of the general public.

E. After the MSA Execution Date, distributing or causing to be distributed within the Commonwealth of Massachusetts any free samples of Tobacco Products except in an Adult-Only Facility. For purposes of this Consent Decree and Final Judgment, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with (1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products (including, but not limited to, a free offer in connection with the purchase of Tobacco Products, such as a "two-for-one" offer), or (2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

F. Using or causing to be used as a brand name of any Tobacco Product pursuant to any agreement requiring the payment of money or other valuable consideration, any nationally recognized or nationally established brand name or trade name of any non-tobacco item or service or any nationally recognized or nationally established sports team, entertainment group or individual celebrity. Provided, however, that the preceding sentence shall not apply to any Tobacco Product brand name in existence as of July 1, 1998. For the purposes of this provision, the term "other valuable consideration" shall not include an agreement between two entities who enter into such agreement for the sole purpose of avoiding infringement claims.

G. After 60 days after the MSA Execution Date and through and including December 31, 2001, manufacturing or causing to be manufactured for sale within the Commonwealth of Massachusetts any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco); and, after 150 days after the MSA Execution Date and through and including December 31, 2001, selling or distributing within the Commonwealth of Massachusetts any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-you-own tobacco containing less than 0.60 ounces of tobacco).

H. Entering into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products. Provided, however, that nothing in the preceding sentence shall be deemed to (1) require any Participating Manufacturer to produce, distribute or otherwise disclose any information that is subject to any privilege or protection; (2) preclude any Participating Manufacturer from entering into any joint defense or joint legal interest agreement or arrangement

(whether or not in writing), or from asserting any privilege pursuant thereto; or (3) impose any affirmative obligation on any Participating Manufacturer to conduct any research.

I. Making any material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients. Provided, however, that nothing in the preceding sentence shall limit the exercise of any First Amendment right or the assertion of any defense or position in any judicial, legislative or regulatory forum.

VI. MISCELLANEOUS PROVISIONS

A. Jurisdiction of this case is retained by the Court for the purposes of implementing and enforcing the Agreement and this Consent Decree and Final Judgment and enabling the continuing proceedings contemplated herein. Whenever possible, the Commonwealth of Massachusetts and the Participating Manufacturers shall seek to resolve any issue that may exist as to compliance with this Consent Decree and Final Judgment by discussion among the appropriate designees named pursuant to subsequent XVIII(m) of the Agreement. The Commonwealth of Massachusetts and/or any Participating Manufacturer may apply to the Court at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement of this Consent Decree and Final Judgment. Provided, however, that with regard to subsections V(A) and V(I) of this Consent Decree and Final Judgment, the Attorney General shall issue a cease and desist demand to the Participating Manufacturer that the Attorney General believes is in violation of either of such sections at least ten Business Days before the Attorney General applies to the Court for an order to enforce such subsections, unless the Attorney General reasonably determines that either a compelling time-sensitive public health and safety concern requires more immediate action or the Court has previously issued an Enforcement Order to the Participating Manufacturer in question for the same or a substantially similar action or activity. For any claimed violation of this Consent Decree and Final Judgment, in determining whether to seek an order for

monetary, civil contempt or criminal sanctions for any claimed violation, the Attorney General shall give good-faith consideration to whether: (1) the Participating Manufacturer that is claimed to have committed the violation has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless that party has been guilty of a pattern of violations of like nature; and (2) a legitimate, good-faith dispute exists as to the meaning of the terms in question of this Consent Decree and Final Judgment. The Court in any case in its discretion may determine not to enter an order for monetary, civil contempt or criminal sanctions.

B. This Consent Decree and Final Judgment is not intended to be, and shall not in any event be construed as, or deemed to be, an admission or concession or evidence of (1) any liability or any wrongdoing whatsoever on the part of any Released Party or that any Released Party has engaged in any of the activities barred by this Consent Decree and Final Judgment; or (2) personal jurisdiction over any person or entity other than the Participating Manufacturers. Each Participating Manufacturer specifically disclaims and denies any liability or wrongdoing whatsoever with respect to the claims and allegations asserted against it in this action, and has stipulated to the entry of this Consent Decree and Final Judgment solely to avoid the further expense, inconvenience, burden and risk of litigation.

C. Except as expressly provided otherwise in the Agreement, this Consent Decree and Final Judgment shall not be modified (by this Court, by any other court or by any other means) unless the party seeking modification demonstrates, by clear and convincing evidence, that it will suffer irreparable harm from new and unforeseen conditions. Provided, however, that the provision of sections III, V, VI and VII of this Consent Decree and Final Judgment shall in no event be subject to modification without the consent of the Commonwealth of Massachusetts and all affected Participating Manufacturers. In the event that any of the sections of this Consent Decree and Final Judgment enumerated in the preceding sentence are modified by this Court, by any other court or by any other means without the consent of the Commonwealth of Massachusetts and all

affected Participating Manufacturers, then this Consent Decree and Final Judgment shall be void and of no further effect. Changes in the economic conditions of the parties shall not be grounds for modificat[illegible] it is intended that the Participating Manufacturers will comply with this Consent Decree and Final Judgment as originally entered, even if the Participating Manufacturers' obligations hereunder are greater than those imposed under current or future law (unless compliance with this Consent Decree and Final Judgment would violate such law). A change in law that results, directly or indirectly, in more favorable or beneficial treatment of any one or more of the Participating Manufacturers shall not support modification of this Consent Decree and Final Judgment.

D. In any proceeding which results in a finding that a Participating Manufacturer violated this Consent Decree and Final Judgment, the Participating Manufacturer or Participating Manufacturers found to be in violation shall pay the Commonwealth's costs and attorneys' fees incurred by the Commonwealth of Massachusetts in such proceeding.

E. The remedies in this Consent Decree and Final Judgment are cumulative and in addition to any remedies the Commonwealth of Massachusetts may have at law or equity, including but not limited to its rights under the Agreement. Nothing herein shall be construed to prevent the Commonwealth from bringing an action with respect to conduct not released pursuant to the Agreement, even though that conduct may also violate this Consent Decree and Final Judgment. Nothing in this Consent Decree and Final Judgment is intended to create any right for Commonwealth of Massachusetts to obtain any Cigarette product formula that it would not otherwise have under applicable law.

F. No party shall be considered the drafter of this Consent Decree and Final Judgment for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter. Nothing in this Consent Decree and Final Judgment shall be construed as approval by the Commonwealth of Massachusetts of the Participating

Manufacturers' business organizations, operations, acts or practices, and the Participating Manufacturers shall make no representation to the contrary.

G. The settlement negotiations resulting in this Consent Decree and Final Judgment have been undertaken in good faith and for settlement purposes only, and no evidence of negotiations or discussions underlying this Consent Decree and Final Judgment shall be offered or received in evidence in any action or proceeding for any purpose. Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments with respect to this Consent Decree and Final Judgment by the Commonwealth of Massachusetts or any Participating Manufacturing or its agents shall be offered or received in evidence in any action or proceeding for any purpose other than in action or proceeding arising under or relating to this Consent Decree and Final Judgment.

H. All obligations of the Participating Manufacturers pursuant to this Consent Decree and Final Judgment (including, but not limited to, all payments obligations) are, and shall remain, several and not joint.

I. The provisions of this Consent Decree and Final Judgment are applicable only to actions taken (or omitted to be taken) within the States. Provided, however, that the preceding sentence shall not be construed as extending the territorial scope of any provision of this Consent Decree and Final Judgment whose scope is otherwise limited by the terms thereof.

J. Nothing in subsection V(A) or V(I) of this Consent Decree shall create a right to challenge the continuation, after the MSA Execution Date, of any advertising content, claim or slogan (other than use of a Cartoon) that was not unlawful prior to the MSA Execution Date.

K. If the Agreement terminates in this Commonwealth for any reason, then this Consent Decree and Final Judgment shall be void and of no further effect.

VII. FINAL DISPOSITION

A. The Agreement, the settlement set forth therein, and the establishment of the escrow provided for therein are hereby approved in all respects, and all claims are hereby dismissed with prejudice as provided therein.

B. The Court finds that the person[s] signing the Agreement have full and complete authority to enter into the binding and fully effective settlement of this action as set forth in the Agreement. The Court further finds that entering into this settlement is in the best interests of the Commonwealth of Massachusetts.

LET JUDGMENT BE ENTERED ACCORDINGLY

DATED this 3d day of December, 1998.

[illegible]

Massachusetts

Department of Education

Tobacco Use Among High School Students: 1999 Massachusetts Youth Risk Behavior Survey Results

November 1999

The Commonwealth of Massachusetts
Department of Education

350 Main Street Malden, Massachusetts 02148-5023
Telephone (781) 338-3000
TTY: N.E.T. Relay 1-800-439-2370

David P. Driscoll
Commission of Education

November 1999

Dear Parents, Students, and Colleagues:

I have attached a report of results concerning adolescent tobacco use from the Department of Education's 1999 Massachusetts Youth Risk Behavior Survey. This anonymous and voluntary survey was conducted last spring in 64 randomly selected public high schools across the Commonwealth; over 4000 students participated. Because both school and student response rates were high, these results can be considered representative of public high school students in the state. The full Youth Risk Behavior Survey Report, which will discuss a range of adolescent risk behaviors in addition to tobacco use, will be available in spring 2000.

Every measure of tobacco use among Massachusetts adolescents has decreased since 1995. The drop in smokeless tobacco use is statistically significant. Declines in ever having tried cigarettes, recent cigarette smoking, smoking before age 13, and smoking on school property have also occurred. Massachusetts can be very encouraged by these positive trends in youth tobacco use.

Difficult as it is to change widespread patterns of tobacco use among adolescents, results reported here indicated that such changes are taking place. The findings contained in this report highlight the importance of early tobacco prevention education that teaches young people both factual knowledge about tobacco and also the skills they need to resist peer and media pressures to smoke. Strong tobacco prevention education, integrated into comprehensive school health programs and reinforced by parents and communities, can reduce and ultimately eliminate tobacco use as a threat to the health of our youth.

Thank you for your own commitment to improving the lives and health of all Massachusetts students.

Sincerely,

/s/ David P. Driscoll
David P. Driscoll
Commissioner of Education

Tobacco Use Among High School Students: 1999 Massachusetts Youth Risk Behavior Survey Results

* * * *

Every two years, the Massachusetts Department of Education conducts the Massachusetts Youth Risk Behavior Survey (MYRBS) to examine the recent rates of adolescent health risk behaviors, including rates of tobacco use. The 1999 MYRBS, administered in randomly chosen public high schools in the Commonwealth in Spring 1999, included questions that asked students to report their history and recent use of cigarettes and smokeless tobacco both on and off school property. For the first time, the MYRBS included a question about recent cigar smoking as well. The MYRBS also asked about students' attempts to quit smoking and about their customary method of obtaining cigarettes. Results reported here can be generalized to provide an accurate estimate of tobacco use among Massachusetts high school students as a whole.

* * * *

Key Findings From the 1999 MYRBS

- Lifetime cigarette use, smoking before age 13, recent smoking, daily smoking, and smoking on school property have declined since 1995. These positive findings, while not statistically significant, demonstrate consistent declines in risk behaviors. Recent smokeless tobacco use both on and off school property has declined steadily and significantly since 1993.
- Over two-thirds of Massachusetts high school students (67%) have tried smoking cigarettes, at least one or two puffs (lifetime use). One quarter of all students (23%) smoked a whole cigarette for the first time before they were 13.
- During the 30 days prior to the survey
- Three in ten students (30%) smoked cigarettes at least once (recent use).

- One in eight students (13%) smoked cigarettes every day (daily use).
- One in six students (16%) smoked cigarettes on school property.
- One in six students (16%) smoked a cigar or cigarillo.
- Five percent of students used smokeless tobacco (chewing tobacco or snuff) at least once, and 3% did so on school property.
- Over one third of students (35%) used *some* form of tobacco.

♦ Male and female adolescents had similar rates of cigarette smoking, but males were much more likely than females to report smoking cigars or using smokeless tobacco.

♦ In general, tobacco use of all kinds was higher among White students and students of other/ mixed ethnicity than it was among Black, Hispanic, or Asian students.

♦ Most recent smokers (58%) and daily smokers (74%) report having tried to quit smoking at least once. Of all students who described themselves as ever having been regular smokers, only one in six (17%) had successfully quit smoking.

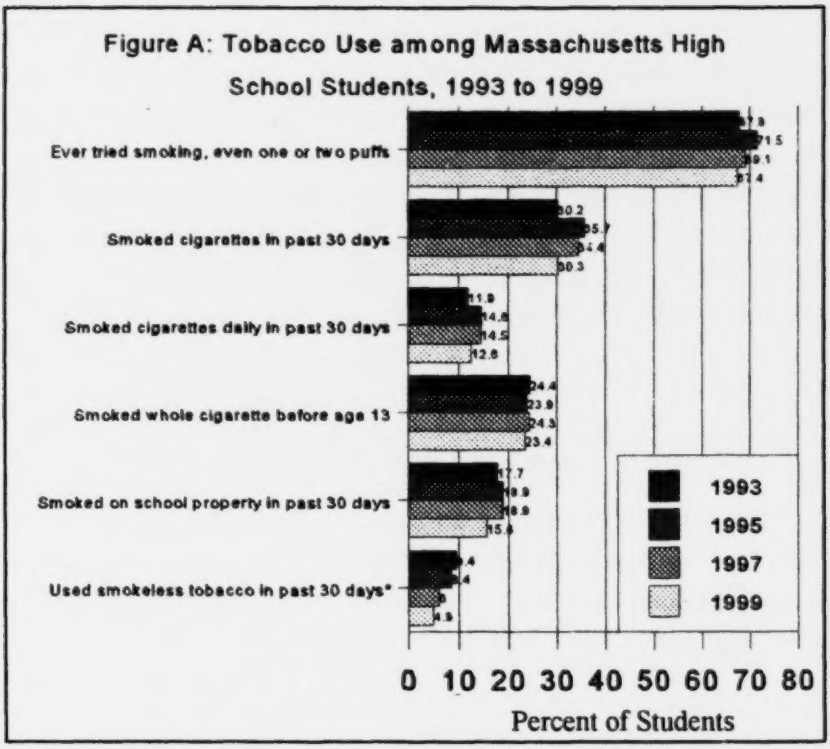
♦ Of adolescents who smoked any cigarettes in the month prior to the survey, 36% usually obtained their cigarettes by buying them in a store. This represents a significant decline from 1995, when nearly half (48%) bought their cigarettes in a store.

♦ The percent of adolescents who were asked for proof of age when they tried to buy cigarettes in a store decreased from 1997 to 1999 (61% to 55%)

* * * *

Results: Lifetime Cigarette Smoking

♦ Over two thirds of Massachusetts high school students (67%) have tried smoking (at least one or two puffs) at some time (lifetime use).



*Statistically significant decline from 1993 and 1995 to 1999, p. < .05.

- Lifetime cigarette smoking, which had risen significantly in the early 90's, has decreased slightly but steadily since then, from 72% (1995) to 67% (1999). (See Figure A, above.)

* * * *

Results: Daily Cigarette Smoking

- Rates of daily smoking dropped slightly between 1997 and 1999 (15% to 13%).
- Daily smoking increased with grade level, from 8% among 9th grade students to 17% among high school seniors.

* * * *

- Among students who smoked every day, 42% smoked at least half a pack a day (11 or more cigarettes), a proportion that has not changed since 1997.

Results: Cigarette Smoking before Age 13

- Almost one quarter of Massachusetts students (23%) reported smoking their first whole cigarette before age 13. Pre-teen smoking has remained virtually unchanged since 1993.
- Male students were somewhat more likely than female students to have smoked their first cigarette before age 13 (25% vs. 22%).

* * * *

- Of all students who had ever smoked a whole cigarette, those who first did so before age 13 were significantly more likely than their peers who started later to be recent cigarette smokers (67% vs. 51%), daily smokers (36% vs. 16%), recent cigar smokers (34% vs. 19%) and smokeless tobacco users (12% vs. 6%).

* * * *

Results: Cigar Smoking and Smokeless Tobacco Use

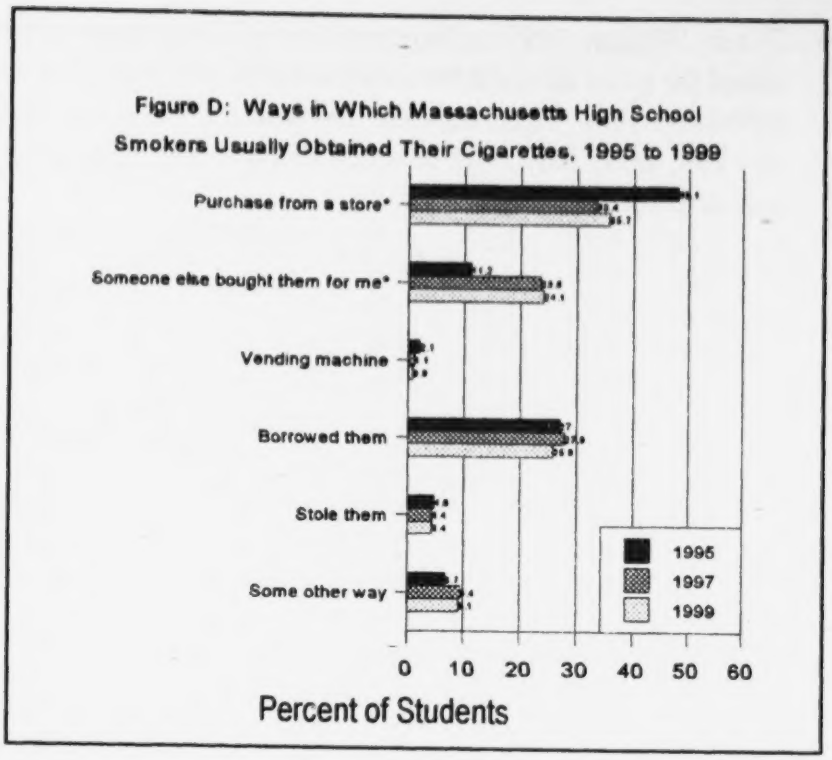
- One in six adolescents (15.6%) reported smoking cigars or cigarillos in the month prior to the survey. The Massachusetts YRBS did not include questions concerning cigar smoking among high school students before 1999.
- Males were significantly more likely than females to have smoked cigars or cigarillos recently (23% vs. 8%).
- Past month cigar smoking was most commonly reported by adolescents of other/mixed ethnicity (26%), followed by White (16%), Black (15%), Asian (11%), and Hispanic (10%) youth.
- Smokeless tobacco (chewing tobacco or snuff) was used by 4.9% of students in the month before the survey. Half of this group (2.7%) also reported using smokeless tobacco on school property.

* * * *

Results: Smoking Cessation

- Nearly one quarter of all students (24%) reported having been "regular smokers," that is, at some time they had smoked daily for at least a month.
- Almost three-quarters (73%) of these "ever regular" smokers had tried to quit smoking at least once and three in ten (31%) had tried to quit three or more times.
- At the time of the survey, only 17% of adolescents who described themselves as ever having been regular (daily) smokers had quit successfully and had not smoked any cigarettes in the past 30 days. Most ever-regular smokers (83%) reported smoking cigarettes recently and half (51%) smoked cigarettes every day.
- Most students who used cigarettes had tried to quit smoking. Among students who reported daily smoking, nearly three-quarters (74%) had tried to quit at least once. Over one-third (36%) had made three or more (unsuccessful) attempts to quit. One out of 14 daily smokers (7%) had tried to quit smoking ten or more times.

* * * *



* Statistically significant change from 1995 to 1999, $p. < .05$.

Results: Obtaining Cigarettes

- Over one third (36%) of students who had smoked cigarettes in the past month usually obtained their cigarettes by buying them in a store (convenience store, supermarket, or gas station). This represents a significant drop from 1995, when 48% of recent smokers reported that they bought their cigarettes in a store. (See Figure D, above.)
- Although sale of tobacco products to underage youth is illegal in Massachusetts, 27% of students who had smoked in the past month and who were age 17 or younger reported that they usually got their cigarettes by buying them in a store.

- From 1995 to 1997, adolescents increasingly reported being asked for proof of age when they tried to buy cigarettes in a store (49% to 61%). Unfortunately, this positive trend was reversed in 1999, when only 55% of youth trying to buy cigarettes were asked for proof of age.

* * * *

TOBACCO USE AMONG MASSACHUSETTS HIGH SCHOOL STUDENTS, 1993 TO 1999

	TOTAL			
	1993	1995	1997	1999
Any cigarette smoking, lifetime	67.8	71.5	69.1	67.4
9th grade	64.4	68.9	62.3	62.6
10th grade	62.3	71.0	72.0	68.5
11th grade	72.8	72.0	69.3	68.1
12th grade	73.0	74.8	73.8	71.1
Recent cigarette smoking	30.2	35.7	34.4	30.3
9th grade	28.9	32.3	27.8	25.1
10th grade	25.2	34.8	35.8	29.2
11th grade	31.0	37.7	35.5	31.4
12th grade	35.9	39.1	40.2	36.9
Daily cigarette smoking	11.9	14.6	14.5	12.6
9th grade	8.1	11.8	10.4	8.2
10th grade	9.9	14.7	14.2	10.5
11th grade	14.1	14.6	15.8	15.8
12th grade	15.9	18.0	18.5	16.9
Recent smokeless tobacco use	9.4	8.4	6.0	4.9
9th grade	10.3	8.8	5.7	4.5
10th grade	8.1	8.1	6.8	4.5
11th grade	10.1	8.1	5.6	5.5
12th grade	8.8	8.1	5.3	4.5
Recent cigar/cigarrillo smoking	na	na	na	15.6
9th grade				13.6
10th grade				13.7
11th grade				16.8
12th grade				18.8
Any recent tobacco use	na	na	na	35.0
9th grade				28.2
10th grade				33.9
11th grade				36.3
12th grade				43.9

IN THE SUPREME COURT

OF THE UNITED STATES

[Caption Omitted in Printing]

Order Granting Petitions for a Writ of Certiorari entered on January 8, 2001.

FEB 22 2001 (5)

Nos. 00-596 and 00-597

Supreme Court, U.S.
FILED
FEB 22 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor To Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General
of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER U.S. SMOKELESS TOBACCO COMPANY

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QUESTIONS PRESENTED

1. Whether strict scrutiny should be applied to content-based restrictions on truthful, nonmisleading smokeless tobacco advertising when the restrictions are designed to suppress speech for reasons unrelated to ensuring a fair bargaining process.

2. Whether under *Central Hudson* a State may meet its burden of showing that restrictions on speech directly and materially advance the asserted interest by submitting data that either tend to contradict or fail to support the State's justification for the restrictions.

3. Whether under *Central Hudson* restrictions on speech, promulgated for the ostensible purpose of addressing minors' smokeless tobacco consumption, are no more extensive than necessary when the State foregoes alternative measures and its own data show a "significant" and "steady" decline in such consumption.

STATEMENT PURSUANT TO RULE 29.6

Amending its prior Rule 29.6 Statement, Petitioner states that effective January 1, 2001, it changed its name from United States Tobacco Company to U.S. Smokeless Tobacco Company. There are no other changes to its prior statement.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000). Pet. App. 1a-45a. The memoranda and orders of the United States District Court for the District of Massachusetts are reported at *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124 (D. Mass. 1999), and *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180 (D. Mass. 2000). Pet. App. 46a-60a and 61a-104a, respectively.

JURISDICTION

The United States Court of Appeals for the First Circuit entered its judgment on July 17, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The regulations of the Massachusetts Attorney General that give rise to this case are codified at 940 C.M.R. §§ 21.00-.07. Pet. App. 105a-14a. The statute under which these regulations were promulgated is Mass. Gen. Laws ch. 93A, § 2. Pet. App. 127a.

The First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

Petitioner U.S. Smokeless Tobacco Company ("USSTC")[1] respectfully submits this Brief in order to present facts and arguments that are uniquely applicable to USSTC, the only Petitioner challenging the regulations of the Massachusetts Attorney General specifically with respect to smokeless tobacco.[2] While it joined with Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R.J. Reynolds Tobacco Company, and Philip Morris Incorporated (the "Cigarette Petitioners") in seeking *certiorari*, USSTC commenced its own action challenging the regulations in the District Court. *See* JA 16-26. Although its action was consolidated below with the related cases filed by the Cigarette Petitioners and the cigar manufacturer and retailer Petitioners, USSTC has throughout the course of this litigation maintained its own, separate claims.[3]

During a period of time in which the State itself recognized that there has been a "steady and significant decline" in underage smokeless tobacco consumption

---

1. Effective January 1, 2001, United States Tobacco Company changed its name to U.S. Smokeless Tobacco Company. For ease of reference, and in order to avoid confusion, only the new name is used in this Brief.

2. USSTC is challenging the following provisions of the regulations in this Court: 940 C.M.R. §§ 21.04(2)(c), 21.04(2)(d), and 21.04(5).

3. Whenever possible, USSTC relies on the Brief submitted by the Cigarette Petitioners, and limits its presentation here in order to avoid repetition.

(Cir. JA 4580),[4] the Massachusetts Attorney General, as part of his declared "war against Big Tobacco" (JA 248), promulgated regulations ostensibly to address the incidence of, *inter alia*, underage smokeless tobacco consumption (Pet. App. 105a). The regulations amount to a virtual ban on smokeless tobacco advertising in metropolitan Massachusetts. At the same time, Massachusetts was spending up to sixteen million dollars per year on anti-tobacco advertising. *See* JA 92. In its decision upholding the regulations against all challenges, the Court of Appeals noted the "sharp decline in the use of smokeless tobacco by young people" (Pet. App. 23a) and expressly acknowledged USSTC's "frustration at increased regulation while current efforts seem to be bearing fruit" (*id.* at 24a).

PROCEEDINGS BELOW

On May 26, 1999, USSTC filed its Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Massachusetts, challenging the validity of certain provisions of the regulations primarily on the grounds that they violated the First Amendment and the Supremacy Clause. JA 16-26.

The District Court granted in part and denied in part Petitioners' cross-motions for summary judgment on First Amendment grounds, upholding the regulations except for its ruling that 940 C.M.R. § 21.04(5)(b), which prohibits indoor advertising below five feet, was unconstitutional. Pet. App. 82a-83a. In addition, in a separate memorandum and order, the District Court granted in part

4. The Joint Consolidated Appendix filed in the United States Court of Appeals for the First Circuit is referred to in this Brief as "Cir. JA."

and denied in part Petitioners' cross-motions for summary judgment on preemption grounds. *Id.* at 59a-60a. The District Court held that the only section of the regulations preempted by the FCLAA was 940 C.M.R. § 21.04(6), which permitted outdoor signs limited in size to 576 square inches and to the words, "Tobacco Products Sold Here." Pet. App. 57a, 59a-60a.

The District Court entered final judgment on January 25, 2000, and USSTC filed its notice of appeal the next day. JA 6. The Court of Appeals stayed the regulations pending appeal on January 31, 2000, and thereafter consolidated the various District Court cases for review. *Id.* at 8-9. On July 17, 2000, the Court of Appeals, with the following exception, affirmed the District Court's First Amendment decision: it reversed the District Court's ruling for Petitioners on indoor advertising below five feet, thus upholding the regulations in their entirety against the First Amendment challenges. *Id.* at 31a-32a, 45a. In addition, the Court of Appeals affirmed the District Court's decision as to preemption. *Id.* at 13a, 45a.[5]

On January 8, 2001, this Court granted *certiorari* in this case and related case no. 00-597, and consolidated them for review.

5. The District Court's decision that 940 C.M.R. § 21.04(6) is preempted by Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1334 (the "FCLAA"), and nonseverable as to smokeless tobacco was not appealed by the Attorney General and therefore was not at issue in the Court of Appeals. Pet. App. 6a & n.2. USSTC contended below that if the regulations are preempted as to cigarettes, then they should be preempted by the FCCLA with respect to smokeless tobacco on the grounds that the regulations cannot be severed in their application between the two. To the extent that this Court finds the regulations preempted by the FCCLA, they should be invalidated as to both cigarettes and smokeless tobacco.

FACTS

Petitioner USSTC, through its subsidiaries, manufactures smokeless tobacco products and engages in truthful and nonmisleading advertising throughout the United States and in Massachusetts. Cir. JA 3754-62. USSTC's advertising promotes its smokeless tobacco products to adult tobacco consumers and provides them with truthful brand, availability, price and other information. *Id.* In addition, all of USSTC's advertisements for years have included the following message: "U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors." *Id.* USSTC also uses self-service displays in the advertising of its smokeless tobacco products, which permit consumers to compare product attributes (such as freshness information) and prices without having to ask a store clerk for assistance. *Id.* at 3755-56, 3762.

It is undisputed that Massachusetts has, in recent years, seen a "steady and significant decline" in underage smokeless tobacco consumption. *Id.* at 4580. In fact, the Attorney General's submission below reveals that minors' smokeless tobacco consumption in Massachusetts dropped nearly 50% from 1993 to 1999 — from 9.4% in 1993 to 6% in 1997, with a further reduction to 4.9% in 1999. JA 284, 287. During this period of decline, the Attorney General promulgated the regulations, in his words, "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." 940 C.M.R. § 21.01. The regulations declare all outdoor cigarette and smokeless tobacco advertising, and indoor cigarette and smokeless tobacco advertising visible from or

directed toward the outside of the retail premises, within 1,000 feet of any school, public park or public playground to be "unfair or deceptive." *See* 940 C.M.R. § 21.04(5).[6] Thus, the practical effect of the regulations is virtually to ban the advertising of smokeless tobacco products in metropolitan Massachusetts. JA 164-67.[7]

The Attorney General conceded, for purposes of summary judgment, the truthful and nonmisleading

6. As to the remaining regulations challenged here by USSTC, 940 C.M.R. § 21.04(2)(c) effectively bans the use of self-service display advertising of smokeless tobacco products at retail outlets, and 940 C.M.R. § 21.04(2)(d) requires that smokeless tobacco products be placed "out of the reach of all consumers, and in a location accessible only to outlet personnel." USSTC's self-service display advertising communicates the availability of particular brands at the retail location, identifies their price, provides freshness information, and may include a selling message. Cir. JA 3757. These advertisements provide consumers with truthful information about USSTC's products and are in no way misleading. *Id.* All current self-service displays also include a diamond-shaped icon that states, "U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors." *Id.*

7. Restrictions on outdoor advertising that the Cigarette Petitioners have accepted by way of agreement are not applicable to USSTC. In November 1998, while the regulations were still proposed and pending public notice and comment, forty-five States — but notably not including Massachusetts — resolved certain claims against USSTC by entering into the Smokeless Tobacco Master Settlement Agreement ("STMSA"). The restrictions on outdoor advertising contained in the STMSA are virtually identical to the outdoor advertising provisions contained in the Master Settlement Agreement entered into by the Cigarette Petitioners and forty-six States, including Massachusetts. However, these provisions of the STMSA are inapplicable in Massachusetts in light of the Commonwealth's failure to join the STMSA.

nature of USSTC's speech concerning a lawful activity (Pet. App. 17a), and maintained that whether USSTC's advertisements are unfair or deceptive is not "relevant to the subject matter of this litigation." Cir. JA 549-52. The Attorney General also acknowledged that the effect of the regulations is to ban tobacco advertising for the specific purpose of suppressing the content of the advertising, *i.e.*, its alleged positive imagery. *See id.* at 541-42. At the same time, from 1994 to 1999, Massachusetts spent between eleven and sixteen million dollars per year on advertising in an effort to reduce tobacco consumption among the entire population. JA 92.

With respect to alternatives to the regulations, the Attorney General has conceded that he did not consider any, other than "to rely on existing enforcement, educational and other efforts to reduce youth access to tobacco." Cir. JA 3738-39. Other alternatives to the regulations, however, are available. For example, Massachusetts does not have in place a retailer licensing scheme for the purpose of supervising compliance with laws prohibiting sales of tobacco products to minors (*id.* at 2937), or laws prohibiting "the purchase, possession or use of tobacco products by minors themselves" (*id.* at 2930). In addition, the Attorney General already has the power, without the regulations, to address any purportedly unfair or deceptive tobacco advertising. *See* Mass. Gen. Laws ch. 93A, § 4.

SUMMARY OF THE ARGUMENT

The regulations violate the First Amendment whether they are reviewed under strict scrutiny or the four-part test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Content-based speech restrictions are presumptively unconstitutional. Any attempt to ban the content of speech because it expresses a particular message or thought with which the State disagrees should be subject to strict scrutiny, regardless of whether the speech is commercial in character or not. Here, for policy reasons entirely unrelated to ensuring a fair bargaining process, the Attorney General has promulgated a content-based regulatory scheme that effectively would ban the concededly truthful and nonmisleading advertising of smokeless tobacco products in metropolitan Massachusetts. At the same time, Massachusetts is at liberty to pursue its "war against Big Tobacco" (JA 248) through all available means, including State-sponsored anti-tobacco speech. Applying strict scrutiny, the regulations must be invalidated.

The regulations also fail to pass constitutional muster under the intermediate scrutiny test applicable to commercial speech under *Central Hudson* and its progeny. First, the Attorney General fails to demonstrate that the regulations directly and materially advance the asserted governmental interest. Indeed, his token submission as to smokeless tobacco tends to contradict or fails to support the alleged causal link between advertising and underage consumption. Second, the regulations' effective ban on advertising is far more extensive than necessary. The Attorney General has admitted that he has not even considered alternatives to the regulations, other than continuing current efforts (Cir. JA 3738-39) — the same efforts, *inter alia*, that already have resulted in a "steady and significant decline" in minors' smokeless tobacco consumption (*id.* at 4580). His refusal to consider these alternative measures is particularly troubling when the Attorney General has conceded that one of these measures — a retailer licensing scheme — has been demonstrated elsewhere to "drastically reduce" the rate of illegal sales to minors. *Id.* at 2937.

ARGUMENT

I. STRICT SCRUTINY SHOULD APPLY TO CONTENT-BASED SPEECH RESTRICTIONS THAT ARE UNRELATED TO ENSURING A FAIR BARGAINING PROCESS.

The regulations constitute presumptively unconstitutional, content-based speech restrictions that should receive strict scrutiny, despite the commercial aspects of the speech they purport to prohibit. The Court of Appeals itself reached the following conclusions that USSTC submits warrant the application of strict scrutiny: the regulations (i) are "plainly content-based" (Pet. App. 14a); (ii) do not "further the state's interest in prohibiting the dispersion of false and misleading information to consumers" (*id.* at 28a n.11); (iii) serve to "dispel[] the advertising-encouraged notion that tobacco products are pervasive and form part of the 'good life' " (*id.* at 29a); and (iv) do not proscribe "tobacco-related speech that has a purpose or effect other than promotion" (*id.* at 14a).

Despite these conclusions, the Court of Appeals applied only a *Central Hudson* analysis. In its decision, the Court of Appeals acknowledged the "recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification," but nevertheless declined to apply strict scrutiny. *Id.* at 16a. USSTC respectfully submits that the nature of the regulations in this case merits strict scrutiny review.[8]

8. The application of strict scrutiny to the regulations is consistent with this Court's prior decisions. However, to the extent that its application here would mark a departure from existing case law, USSTC submits that strict scrutiny should apply to the regulations for the reasons set forth herein and in the Brief submitted by the Cigarette Petitioners.

A. Strict Scrutiny Applies To Content-Based Speech Restrictions.

A cornerstone of First Amendment jurisprudence is the presumptive unconstitutionality of content-based speech restrictions, which receive strict scrutiny. "Content-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and "a content-based speech restriction . . . can stand only if it satisfies strict scrutiny," *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1886 (2000).[9]

This foundation, upon which rest many of this Court's most important First Amendment decisions, exists for good reason: content suppression interferes with a central purpose of the First Amendment, that every "citizen is entitled to seek out or reject certain ideas or influences without Government interference or control." *Id.* at 1889; *see Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195 (1999) ("presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct"). In addition, the urge of government officials to silence speech with which they disagree is all too great, and a strong rule that protects the content of speech from government control, backed up by strict scrutiny, helps to keep this temptation in check. "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the

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9. While the regulations do not totally ban smokeless tobacco advertising, "[i]t is of no moment that [they do] not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Entm't*, 120 S. Ct. at 1886.

standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

Indeed, the First Amendment does not exist to protect favored speech, but rather to ensure the viability of disfavored speech. "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled by Girouard v. United States*, 328 U.S. 61, 68-69 (1946). Regardless of whether or not the Attorney General believes that he is serving legitimate interests by silencing tobacco companies, the First Amendment prohibits him from doing so.

These principles should be no less applicable to USSTC's advertising merely because the speech is suppressed for the stated purpose of addressing underage smokeless tobacco consumption, unquestionably a laudable goal. In *Playboy Entertainment*, this Court held that content-based restrictions must be reviewed under strict scrutiny, even when the purpose of the restrictions is to protect minors. 120 S. Ct. at 1885-87. The *Playboy Entertainment* decision thus reaffirms prior speech cases holding that an interest in protecting minors does not relieve the government of its responsibility to act in conformity with the Constitution. *See, e.g., Butler v. Michigan*, 352 U.S. 380, 383 (1957) (speech restrictions may not "reduce the adult population . . . to reading only what is fit for children" as "[s]urely, this is to burn the house to roast the pig"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

B. The Regulations Effectively Ban Advertising For Reasons Unrelated To Ensuring A Fair Bargaining Process.

Commercial speech restrictions traditionally have been subject to only intermediate scrutiny because they are based on the government's interest in ensuring a fair bargaining process. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), Justice Stevens observed that this Court has endorsed the view that it "is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation.' " *Id.* at 502 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). As Justice Stevens explained, "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it] — with offerors communicating offers to offerees.' " *44 Liquormart*, 517 U.S. at 499 (alteration in original) (citations omitted). Thus, this Court's "early cases uniformly struck down several broadly based bans on truthful, nonmisleading commercial speech, each of which served ends unrelated to consumer protection." *Id.* at 497-98. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (holding unconstitutional restrictions that were designed, in part, to protect minors from "advertisements of contraceptive products . . . [that] would legitimize sexual activity of young people").

In the instant case, the regulations are not directed to ensuring a fair bargaining process, and thus the theoretical basis for applying less than strict scrutiny is absent. Indeed, the Court of Appeals was "not persuaded that the regulations further the state's interest in prohibiting the dispersion of

false and misleading information to consumers." Pet. App. 28a n.11. In addition, the Attorney General essentially has admitted as much, contending that whether USSTC's advertisements are unfair or deceptive is not "relevant to the subject matter of this litigation." *See* Cir. JA 549-52. Because the regulations strike "at the ideas conveyed and form of expression," *Carey*, 431 U.S. at 701 n.28, and not at any commercial aspect of USSTC's speech, strict scrutiny should apply.

C. The Regulations Effectively Ban Speech That Promotes Smokeless Tobacco Brands While Permitting The State To Communicate Anti-Tobacco Messages At Will.

The Attorney General has conceded that the regulations are specifically intended to suppress the alleged positive imagery associated with tobacco. *See* Cir. JA 541-42. As the Court of Appeals noted, the regulations serve to "dispel[] the advertising-encouraged notion that tobacco products are pervasive and form part of the 'good life' " (Pet. App. 29a) and proscribe only speech " 'the purpose or effect of which is to promote the use or sale of . . . tobacco' " (*id.* at 14a) (quoting 940 C.M.R. §§ 21.03, 22.03).

Yet, at the same time that USSTC's speech promoting its brands is effectively silenced by the regulations, the State is permitted free reign to communicate its anti-tobacco messages.[10] Indeed, then-Attorney General Scott Harshbarger

10. In addition to communicating other information, USSTC's advertising also presents its particular viewpoint that its smokeless tobacco products are for sale to adults only, which is captured in the following message included in all of USSTC's advertisements: (Cont'd)

announced his decision to promulgate the regulations as part of Massachusetts' continuing "war against Big Tobacco." JA 248. Massachusetts' arsenal in this "war" includes State-sponsored anti-tobacco speech. For instance, from 1994 to 1999 the Commonwealth spent between eleven and sixteen million dollars per year on television, radio, billboard and print advertising in an effort to reduce tobacco consumption among the entire population. JA 92. In addition, anti-tobacco speech by private individuals or groups is left unfettered by the regulations, because they do not proscribe "tobacco-related speech that has a purpose or effect other than promotion." Pet. App. 14a. Under the First Amendment, however, government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message . . . ." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).[11] Thus, despite his desire to silence USSTC, the Attorney General is not allowed to dictate the scope of a permissible, official dialogue about smokeless tobacco by

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(Cont'd)

"U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors." Cir. JA 3756-62. It is of no moment that this viewpoint on a matter of public concern is contained within advertising, because "the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context." *Discovery Network*, 507 U.S. at 426 n.21.

11. Strict scrutiny applies in such cases because "[v]iewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995).

censoring the disfavored view and declaring as the gospel the State's own message. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). Such a regime constitutes pure thought control that is more appropriate for Orwell than for Lowell because, in our system, there can be no "Ministry of Truth." *See* George Orwell, *1984* (1949).[12]

When the State disfavors a particular message, " 'the remedy to be applied is more speech, not enforced silence.' " *44 Liquormart*, 517 U.S. at 498 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)). The Commonwealth has shown that it is quite capable of responding to any thoughts or messages it dislikes. As the Attorney General advised the Court of Appeals, the "Commonwealth's tobacco control efforts include . . . a sustained counter-advertising campaign." Brief of Defendant-Appellee at 8 (1st Cir.) (No. 01117). At a time when tobacco companies are being vilified, there exists an even greater need to protect USSTC's constitutional rights to promote its smokeless tobacco brands to adult tobacco consumers and to communicate its stance against the sale of smokeless tobacco products to minors.

For the foregoing reasons, the regulations should be reviewed under strict scrutiny, a test they cannot pass.

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12. Indeed, the regulations as promulgated included an express exception for State-sanctioned tobacco advertising, in the form of outdoor signs no larger than 576 square inches, that were limited in content to black text on a white background stating "Tobacco Products Sold Here." 940 C.M.R. § 21.04(6).

II. EVEN IF THE *CENTRAL HUDSON* TEST PROVIDES THE APPROPRIATE STANDARD FOR EVALUATING THE REGULATIONS, THEY FAIL TO MEET CONSTITUTIONAL REQUIREMENTS.

Even if this Court decides that the *Central Hudson* test provides the appropriate standard for assessing the constitutionality of the regulations, the Court of Appeals' decision on *Central Hudson's* third and fourth parts — which rests on a highly deferential standard of review more akin to rational basis than intermediate scrutiny — should be reversed with respect to USSTC because the Attorney General has failed to meet his "burden of . . . justifying the challenged restriction[s]." *Greater New Orleans*, 527 U.S. at 183.[13]

The Court of Appeals' decision that the Attorney General's token submission as to smokeless tobacco satisfies *Central Hudson's* third part is incorrect, and reflects a level of deference to the Attorney General's judgment that is fundamentally at odds with *44 Liquormart*.[14] *See* 517 U.S.

13. The first and second parts of the *Central Hudson* test are not at issue. The first part — that the speech at issue concern lawful activity and be truthful and nonmisleading — was not at issue in the Court of Appeals because the Attorney General conceded this point for purposes of summary judgment. Pet. App. 17a. Similarly, the second part's requirement of a substantial state interest was not challenged by USSTC. *See* Plaintiff's (USSTC's) Memorandum Of Law In Opposition To Motion For Partial Summary Judgment (First Amendment Claims) at 10 n.11 (D. Mass.) (99-11118).

14. In *44 Liquormart*, this Court specifically rejected the deferential approach to regulation applied here by the Court of Appeals. 517 U.S. at 510; *id.* at 531-32 (O'Connor, J., concurring) ("examin[ing] more searchingly the State's professed goal, and the speech restrictions put into place to further it, . . . comports better with the purpose of the analysis set out in *Central Hudson*"). Indeed, (Cont'd)

at 509-10; *id.* at 531-32 (O'Connor, J., concurring). The Attorney General's submission as to smokeless tobacco, which USSTC submits is patently inadequate, tends to contradict or fails to support the stated justification for the regulations.

With respect to *Central Hudson's* fourth part, the regulations cannot be deemed no more extensive than necessary in light of (i) the "steady and significant decline" in underage smokeless tobacco consumption that has been occurring over the past decade in the absence of the regulations (Cir. JA 4580), and (ii) numerous less restrictive alternatives to the regulations, including one that the Attorney General has recognized could "drastically" reduce the sale of tobacco products to minors (*id.* at 2937).

A. The Attorney General's Smokeless Tobacco Submission Fails To Demonstrate That The Regulations Will Directly And Materially Reduce Minors' Smokeless Tobacco Consumption.

Under the third part of *Central Hudson*, the Attorney General must demonstrate that the regulations "directly and materially advance[] the asserted governmental interest."

(Cont'd)
the Court of Appeals' extreme deference to the Attorney General seems to be more in accord with the rationale of *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which this Court has rejected than with this Court's more recent decisions. *See Greater New Orleans*, 527 U.S. at 182 (noting that the *44 Liquormart* Court found that Supreme Court precedent "both preceding and following *Posadas* had applied the *Central Hudson* test more strictly"); *see also Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (" 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978))).

Greater New Orleans, 527 U.S. at 188. " '[T]his requirement is critical; otherwise "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." ' " *Id.* (citations omitted). " 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) ("[A]necdotal evidence and educated guesses" are insufficient.). Consequently, the Attorney General must prove that the regulations do more than merely provide "ineffective or remote support" for the stated objective. *Central Hudson*, 447 U.S. at 564.

In the instant case, the Court of Appeals held, with respect to smokeless tobacco, that "[t]he product-specific information submitted by the Attorney General, taken in conjunction with the other statistical and anecdotal information presented," satisfies *Central Hudson's* third part. Pet. App. 27a. USSTC respectfully submits that this holding was erroneous. The Attorney General's smokeless tobacco-specific submission is meager, and what little there is tends to contradict or fails to support the Attorney General's justification for the regulations.

1. The Attorney General Cannot Rely On Information Related To Cigarette Advertising To Ban Smokeless Tobacco Advertising.

As the Court of Appeals recognized, the Attorney General's submission below related predominantly to cigarettes. Pet. App. 27a. However, the Attorney General cannot justify restrictions on speech regarding one product based on data submitted with respect to another, particularly when the data itself demonstrate a lack of parity between the products on the very issues critical to the First Amendment inquiry. *See Central Hudson*, 447 U.S. at 564 ("ineffective or remote support" insufficient); *Edenfield*, 507 U.S. at 770 ("mere speculation or conjecture" insufficient).

According to the Attorney General's submission, while cigarette smoking among ninth through twelfth-graders in Massachusetts increased between 1993 and 1997, smokeless tobacco consumption within the same population sample "declined steadily" and "significantly" (Cir. JA 1074-75, 1078); while minors were successful 42% of the time when illegally purchasing cigarettes, minors were successful 15% of the time when purchasing smokeless tobacco (*id.* at 2471); and while cigarettes were accessible to shoplifters in 50.5% of subject outlets in a survey, smokeless tobacco was accessible to shoplifters in 6.1% of the same outlets (*id.* at 2477). Given this lack of parity, the Attorney General's reliance on data relating to cigarettes to censor smokeless tobacco advertising cannot survive scrutiny under *Central Hudson*.

2. The Attorney General's Smokeless Tobacco Submission Tends To Contradict Or Fails To Support His Justification For The Regulations.

As an initial matter, the Attorney General's extremely limited smokeless tobacco-specific submission includes a 1999 Massachusetts Department of Education survey that shows that smokeless tobacco usage among minors in Massachusetts has "declined steadily" and "significantly" since 1993, from 9.4% in 1993 to 6% in 1997 (Cir. JA 1074, 1078), with a further reduction to 4.9% in 1999 (JA 284, 287). This decline has occurred in the absence of the regulations.

In addition, an "observational study" relied upon by the Attorney General tends to contradict the Attorney General's proposition that advertising causes minors' demand for tobacco products. Cir. JA 2469-89. This study observed a "lack of association between illegal sales rates and advertising" and noted that "others have reported similar findings." *Id.* at 2482.[15] Another study cited by the Attorney General (2516-22), which was conducted in California in 1990, 1992, and 1993, found that advertising was "associated" with consumption but questioned the "directionality of the relationship," stressing that an association between perception of advertising and consumption does not "provide evidence suggesting a causal link" (*id.* at 2521).[16]

15. Indeed, the expert testimony of record confirms that family influence and peer pressure — not advertising — principally influence whether minors will consume tobacco products. JA 151-52.

16. There are other examples that reveal the self-contradictory or irrelevant nature of the Attorney General's submission with respect to smokeless tobacco. For instance, two other "studies" in the (Cont'd)

Finally, the Attorney General's smokeless tobacco submission includes conclusory statements made by the Food and Drug Administration (the "FDA"). In connection with the adoption of its vacated rule concerning tobacco products, the FDA asserted that a shift in smokeless tobacco consumption trends during the 1970s and early 1980s signaled the "effectiveness of advertising." *Id.* at 1531.[17]

(Cont'd)
Attorney General's submission mention advertising and smokeless tobacco, but they do not address whether any causal link exists between smokeless tobacco advertising and minors' consumption. The first, written over ten years ago, describes smokeless tobacco advertisements from roughly fifteen to thirty years ago. Cir. JA 2559-66. It does not discuss USSTC's point-of-sale and outdoor advertising, let alone USSTC's current advertising. The other study is entitled, *Smokeless tobacco brand preference and brand switching among US adolescents and young adults*. *Id.* at 2490-95. The purpose of this study was, *inter alia*, to "describe the brand preference of young smokeless tobacco users" as it related to duration and intensity of consumption (*id.* at 2490) — not whether there is a causal link between smokeless tobacco advertising and minors' consumption. Also, the Attorney General's submission includes the 1994 Report of the Surgeon General, *Preventing Tobacco Use Among Young People* (*id.* at 1203-376), which contains isolated paragraphs that purport to address smokeless tobacco marketing and usage trends in the 1970s and the mid-1980s (*id.* at 1336). This report, however, does not rely on current information or analyze whether there is a causal link between smokeless tobacco advertising specifically and minors' consumption.

17. Even assuming, *arguendo*, that the FDA's conclusory opinion could help justify the regulations, the FDA rulemaking pursuant to which the statement was made was held by this Court to be beyond the FDA's jurisdiction. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The FDA revoked and removed the subject regulations after this Court's ruling that it lacked jurisdiction. *See* Regulations Restricting the Sale (Cont'd)

The FDA rulemaking, however, addressed only alleged decades-old marketing, and, in any event, the agency conceded that there is not a single study that "[e]stablish[es] that advertising has an effect of directly causing minors to use tobacco products." *Id.* at 1523.[18]

If the third part of *Central Hudson* can be satisfied by this record, which actually tends to contradict or does not support the Attorney General's justification for the regulations as to smokeless tobacco, then surely the requirement is rendered meaningless. *See Edenfield*, 507 U.S. at 772 (invalidating speech restrictions when evidence tended to "contradict[], rather than strengthen[]" the justifications for the restrictions). In *44 Liquormart*, 517 U.S. 484, Justice Stevens reasoned that in the absence of any evidence it could not be assumed for third prong purposes that price advertising for alcohol affected temperance. *See id.* at 505-07. Similarly, the Court of Appeals here could point to no relevant evidence demonstrating a causal link between smokeless tobacco advertising and consumption by minors, and in essence relied instead only on the kind of " 'speculation and conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *Id.* at 507 (citation omitted).

(Cont'd)
and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Revocation, 65 Fed. Reg. 17135, 17136 (Mar. 31, 2000).

18. In another example of its overly deferential approach to the regulations, the Court of Appeals expressly recognized USSTC's objection that the purported basis for the FDA's conclusory statement in its rulemaking was "dated" and "d[id] not specifically evaluate the impact of outdoor advertising," but nonetheless held that "such objections demand more than *Central Hudson* requires." Pet. App. 23a.

B. The Regulations' Ban On Advertising Is Far More Extensive Than Necessary.

The fourth *Central Hudson* requirement is that the restriction must not be more extensive than necessary to serve the asserted interest. *Central Hudson*, 447 U.S. at 566. Given that the regulations were promulgated during the midst of a period of steady and significant decline in minors' consumption of smokeless tobacco products, and without regard for less restrictive means of further reducing minors' consumption, they cannot meet this part of the test. As an initial matter, the best proof of the regulations' failure to meet the fourth part is reflected by the Court of Appeals' conclusion, based on the Attorney General's own submission, that "current efforts seem to be bearing fruit" with respect to the noted decline in underage smokeless tobacco consumption. Pet. App. 24a. If the asserted interest is being well-served in the absence of speech restrictions, how can it possibly be said that the regulations are no more extensive than necessary?

Further, the Attorney General has conceded that he did not consider any alternatives to the regulations, other than "to rely on existing enforcement, educational and other efforts to reduce youth access to tobacco." Cir. JA 3739. As might be expected, there are numerous alternatives to banning USSTC's speech that would directly advance the Attorney General's stated purpose of reducing minors' consumption of smokeless tobacco products. Notably, Massachusetts has no licensing scheme to supervise compliance with laws prohibiting sales of tobacco products to minors. Yet the Attorney General's 1994 survey found that such a licensing program could "drastically reduce the sale of tobacco products to minors." Cir. JA 2937. In addition, minors could

be prohibited from purchasing, possessing, or consuming tobacco products. Furthermore, enforcement of existing laws that penalize the sale of tobacco (such as Mass. Gen. Laws ch. 270, § 6) could be strengthened, such as by encouraging retailers to use electronic age verification measures.[19] Finally, the Attorney General already has the power to combat advertising that actually is unfair or deceptive on a case-by-case basis. *See* Mass. Gen. Laws ch. 93A, § 4. Such an approach would be far less restrictive than the current declaration that all smokeless tobacco advertising is, *ipso facto*, unfair and deceptive.[20]

It can hardly be said that the regulations' effective ban on smokeless tobacco advertising is no more extensive than

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19. Four States to date have adopted legislation authorizing retailers to use such verification measures. *See* Fla. Stat. Ann. ch. 569.4 (West Supp. 2001); N.Y. Pub. Health § 1399-cc (McKinney Supp. 2001); Ohio Rev. Code Ann. §§ 2927.021, 2927.022 (West 2000); Wyo. Stat. Ann. § 14-3-302 (West 2000).

20. Moreover, the regulations' effective ban on advertising leaves no adequate, alternative means for USSTC to communicate, *inter alia*, its age of purchase message, "U.S. Tobacco Reminds You — Smokeless Tobacco — Not For Sale To Minors," selling message, product availability, freshness information, and price at retail locations. Cir. JA 3755-57. In *44 Liquormart*, this Court's ruling that the advertising restriction at issue was more extensive than necessary was based on the following: "[the restriction] prevent[ed] sellers of alcohol from communicating price information anywhere but at the point of purchase," "[n]o channels exist[ed] at all to permit them to publicize the price," 517 U.S. at 530-31 (O'Connor, J., concurring), and alternatives to the price advertising ban were available, *id.* at 507. For the same reasons, the regulations here are more extensive than necessary and fail *Central Hudson's* fourth part. *See also City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (recognizing there was "no practical substitute" to prohibited residential signs).

necessary, in light of the steady and significant decline in minors' smokeless tobacco consumption in the absence of the regulations, the foregone alternatives noted above, and the Attorney General's existing ability to proceed against advertising that is, in actuality, unfair or deceptive.

CONCLUSION

For the foregoing reasons, Petitioner USSTC respectfully requests that this Court reverse the judgment of the Court of Appeals.

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No. 00–596

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

1. Whether state regulations that sharply limit the public display of cigarette advertisements impose requirements "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts' content- and viewpoint-based prohibition on virtually any public display of tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

PARTIES TO THE PROCEEDINGS

The Petitioners in No. 00-596 are Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company (formerly United States Tobacco Company). The Respondent is Thomas Reilly, the Attorney General of Massachusetts. The Petitioners in No. 00-597, which has been consolidated with No. 00-596, are Altadis U.S.A. Inc., as successor to Consolidated Cigar Corp. and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, as successor to Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North American, Inc.; Swisher International, Inc., who were also parties to the consolidated appeals below.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-45a) is reported at 218 F.3d 30. The district court's decision on the preemption claim (Pet. App. 46a-60a) is reported at 76 F. Supp. 2d 124, and its decision on the First Amendment claim (Pet. App. 61a-104a) is reported at 84 F. Supp. 2d 180.

JURISDICTION

The court of appeals entered its judgment in the consolidated appeals on July 17, 2000. Pet. App. 1a. The petition for a writ of certiorari was filed on October 16, 2000. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The challenged regulations are reprinted in the Appendix to the Petition (Pet. App. 105a-126a), as is the statute under which the regulations were promulgated (Pet. App. 127a).

Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (2000).

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme

> Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT

In recent years, numerous States and local jurisdictions have enacted diverse and increasingly severe limitations on the public display of tobacco advertisements. *See, e.g.*, Pet. App. 128a-34a. Like the Massachusetts regulations at issue in this case, many of these restrictions prohibit virtually *all* outdoor advertising within a broadly defined distance of any "park," "playground," or "school." As in this case, the resulting geographical sweep of these prohibitions often covers as much as 90% of the most populated areas in the jurisdiction. And again, like the regulations in this case, many of these regulations impose further substantial restrictions on the display of tobacco advertising *inside* retail establishments. The purpose of all these restrictions is unabashedly censorial: as Respondent acknowledged below, the challenged regulations are based on the premise that, for the putative purpose of preventing children from being exposed to "positive" images of tobacco products that involve significant health risks, any tobacco advertising aimed at adults must be banned from virtually all public areas.

Petitioners (various tobacco manufacturers) brought suit, contending that Massachusetts' severe restrictions on cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, and violated the First and Fourteenth Amendments. The court of appeals ultimately rejected both challenges and upheld the relevant provisions of the regulations. Pet. App. 1a-37a. It is this decision that is presently before the Court for review.

1. In May 1998, then-Massachusetts Attorney General Scott Harshbarger proposed the regulations on tobacco advertising that are challenged in this case. JA 102. In November of the same year, while the proposed regulations were still pending for public notice and comment, the Attorneys General of 46 States (including Massachusetts) settled several lawsuits against the undersigned Petitioners by entering into a "Master Settlement Agreement" (MSA). *See* JA 259-71, 272-82. In addition to agreeing to pay the States more than $200 billion over 25 years (of which about $300 million per year would go to Massachusetts), the four manufacturers who signed the MSA voluntarily agreed to substantial restrictions on their outdoor advertising, including a prohibition on the use of billboards, a ban on the use of signs in arenas, stadiums, shopping malls, or video arcades, and a ban on any advertising outside retail stores that is larger than 14 square feet. JA 259-60, 263-64. The MSA expressly excluded from these voluntary restrictions, *inter alia*, any advertising outside retail stores that is *less* than 14 square feet. JA 259-60.

Despite obtaining the cigarette manufacturers' agreement to these limitations on advertising, the Massachusetts Attorney General went forward with the proposed tobacco regulations, which were formally promulgated on January 22, 1999. Although the MSA and its accompanying consent decree also contain an explicit prohibition on any advertising that directly or indirectly targets minors, JA 260, 274, the Attorney General asserted that the proposed regulations' severe restrictions on advertising were necessary to protect minors from the health risks of tobacco products. 940 C.M.R. § 21.01; JA 251; 1st Cir. JCA 387-89. These regulations prohibit virtually all outdoor advertising of tobacco and sharply limit indoor advertising as well. As described by the Attorney General, the theory of the regulations is that, in order to prevent minors from being influenced by tobacco advertisements addressed to adult smokers, *all* tobacco advertising must effectively be

eliminated from public areas where it might be seen by children. 1st Cir. JCA 539-41.[1]

Three provisions of these regulations are at issue here. First, 940 C.M.R. § 21.04(5)(a) effectively eliminates the use of outdoor advertising to provide truthful brand, availability, price, and other information to adult consumers of tobacco products. Specifically, § 21.04(5)(a) prohibits manufacturers, distributors, and retailers of tobacco products from using any "[o]utdoor advertising" of cigarettes and smokeless tobacco products in "any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." Pet. App. 111a. Another provision of the regulations uses virtually identical language to impose similar restrictions on cigar advertising. 940 C.M.R. § 22.06(5), Pet. App. 123a.

The number of locations that trigger the 1,000 foot zone is so extensive that the resulting area covered by the regulations includes most of the heavily populated areas of Massachusetts. A detailed geographical analysis of the State's three largest cities revealed that between 87 and 91 percent of the land area of those cities was covered by § 21.04(5)(a)'s flat prohibition on outdoor advertising. JA 161-67. The severity of § 21.04(5)(a)'s prohibition on "outdoor advertising" is further magnified by the fact that the term is defined to include, not only advertising that is actually "outside," but also any advertising that is "within a retail establishment that is directed toward or visible from the outside of the establishment." 940

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[1] In issuing the regulations, the Attorney General relied upon his authority to declare certain practices to be *per se* an "unfair and deceptive act or practice" under Mass. Gen. Laws ch. 93A, § 2. Pet. App. 127a. It is undisputed, however, that the regulations do *not* require any showing of falsity; for purposes of summary judgment, the Attorney General was willing to assume "that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." Pet. App. 17a.

C.M.R. § 21.04(5)(a), Pet. App. 111a. The term "advertising," in turn, is sweepingly defined to include "any oral, written, graphic or pictorial statement or representation . . . the purpose or effect of which is to promote the use or sale" of cigarettes or smokeless tobacco products. *Id.*, § 21.03, Pet. App. 107a.

Second, 940 C.M.R. § 21.04(5)(b) provides that, *inside* any retail establishment that is accessible to minors and that is within the same 1,000-foot zone, no portion of any advertisement of cigarettes or smokeless tobacco may be "placed lower than five feet from the floor." Pet. App. 111a. Again, another section of the regulations uses virtually identical language in imposing the same restrictions on cigar advertising in Massachusetts. 940 C.M.R. § 22.06(5)(b), Pet. App. 123a.

Third, 940 C.M.R. § 21.04(2)(c) and (d) severely restrict the visible display of tobacco products in retail outlets by requiring that cigarettes and smokeless tobacco be placed "out of the reach of all consumers, and in a location accessible only to outlet personnel." Pet. App. 109a.[2] Subsections 22.06(2)(c) and (d) of the same regulations impose identical restrictions on the display of cigar products. Pet. App. 121a.

2. The Petitioners in No. 00-596 are four cigarette manufacturers (Lorillard Tobacco Co., Brown & Williamson Tobacco Corp., R.J. Reynolds Tobacco Co., and Philip Morris Inc.) and a maker of smokeless tobacco products (U.S. Smokeless Tobacco Company). In May 1999, Petitioners filed separate federal actions for declaratory and injunctive relief challenging various aspects of the regulations. A similar lawsuit was also filed by eight cigar companies, and all of the actions were ultimately consolidated. The cigarette companies

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[2] All four of the undersigned Petitioners challenge § 21.04(5)(a) and (b) on both preemption and First Amendment grounds. In this Court, only Petitioners Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company challenge § 21.04(2), and (as in the proceedings below) this provision is challenged only on First Amendment grounds.

alleged that several of the regulations were preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. § 1334(b), which provides that States shall not impose any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. Petitioners also alleged that several of the regulations violated the First Amendment.

On December 2, 1999, the district court granted partial summary judgment to the Attorney General, holding that § 5(b) of the FCLAA did not preempt either the outdoor advertising prohibition (§ 21.04(5)(a)) or the ban on indoor advertisements that were less than five feet from the floor (§ 21.04(5)(b)). Pet. App. 59a-60a. The district court relied on its understanding of the "purpose" and legislative history of the FCLAA to conclude that, notwithstanding the breadth of the statute's plain language, "*location-based* restrictions [on advertising] are not preempted by the Act." Pet. App. 56a (emphasis added). Because § 21.04(5) outlawed tobacco advertising only if it was placed "outdoor[s]" or at "ground-level," the district court held that it was a location restriction that was not preempted. *Id.*

Shortly thereafter, the district court issued a second order granting summary judgment to the Attorney General on all but one of the First Amendment claims. The court rejected Petitioners' threshold contention that, because the regulations effectively suppressed all tobacco advertising in public areas, a heightened standard of scrutiny should apply. Pet. App. 66a. In doing so, the court held that the "standard of review for commercial speech restrictions" turned on the "social benefits of the advertised product," so that a court would undertake a more searching review of advertising restrictions involving "socially- or politically-important products." *Id.* Because cigarette advertising was, in the district court's view, "functional pornography," *id.* at 61a, that promoted a product with "no readily discernable social or health benefits," *id.* at

66a, there was "no compelling reason to apply a heightened standard." *Id.* at 68a. Applying the four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the district court upheld the outdoor advertising restrictions in § 21.04(5)(a) and the display ban in § 21.04(2), but the court concluded that the Attorney General had wholly failed to support the indoor advertising limitations in § 21.04(5)(b). Pet. App. 82a-83a.

3. The court of appeals affirmed in part and reversed in part, upholding in their entireties the advertising and display regulations relevant here. Pet. App. 45a. With respect to the preemption claims, the court declined to adopt what it termed a "hyper-literal" reading of the statutory phrase "with respect to the advertising or promotion of cigarettes." Pet. App. 10a. Instead, the court concluded that the sorts of restrictions on tobacco advertising at issue here do "not impose obligations 'with respect to' . . . advertising as that phrase is used in § 1334(b)." *Id.* (quotation omitted). Relying upon its view of Congress' underlying "purposes" in enacting the FCLAA, the court of appeals held that, in light of the States' traditional power to prescribe local zoning restrictions on the placement of advertisements, Respondent's regulations were "location restrictions" that did not "present the kind of 'diverse, nonuniform, and confusing' advertising standards with which Congress was concerned when it enacted the FCLAA." *Id.* at 13a & n.7 (quoting 15 U.S.C. § 1331).

The court of appeals also rejected Petitioners' contention that the advertising and display restrictions violated the First Amendment. Pet. App. 14a. In determining what level of scrutiny to apply, the court expressly agreed with Petitioners that the regulations were "content-based." As the court observed, "[a]dvertising of other products [than tobacco] is not restricted by the regulations, nor is tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns." *Id.* Despite this conclusion, and despite

what it acknowledged were "recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification," the court nonetheless concluded that, under existing precedent, it was "bound to apply the *Central Hudson* test, as is, to this case." *Id.* at 16a.

Applying *Central Hudson*, the court of appeals noted that, for purposes of summary judgment, the Attorney General had conceded that "the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." Pet. App. 17a. The court also concluded that the State's interest in reducing tobacco consumption by minors was "substantial." *Id.* In evaluating whether the Attorney General had demonstrated that the proposed regulations would "directly advance" that interest, the court held that it was sufficient for Respondent to rely upon the "'common-sense' argument . . . that advertising has some cause-effect relationship with consumption" and to submit a collection of studies and articles culled from governmental reports and various publications. *Id.* at 26a. By contrast, the court treated Petitioners' substantial evidentiary presentation (including expert affidavits) as largely irrelevant, concluding that the materials presented by the Attorney General were sufficient to permit him reasonably to conclude "that advertising restrictions will reduce tobacco use among young people." *Id.* And although the court acknowledged that the Attorney General's showing with respect to smokeless tobacco and cigars was substantially weaker, the court held that these other products were properly subjected to the same regulations "as part of a rational and well-founded comprehensive tobacco regulatory scheme." *Id.* at 28a.

Applying the fourth and final prong of the *Central Hudson* test, the court of appeals concluded that the regulations were sufficiently "'narrowly tailored to achieve the desired objective.'" Pet. App. 29a (citation omitted). The court held

that the 1,000-foot benchmark was not arbitrary because it had been copied from the FDA's proposed outdoor advertising regulations—even though the Attorney General conceded in the district court that the distance "was based on the [FDA's] analysis of the visibility of large billboards," as opposed to the smaller signs (no larger than 14 square feet) permitted by the MSA. Pet. App. 80a-81a. The court of appeals acknowledged that the record showed that the effect of using a 1,000-foot rule in Massachusetts would be to make all outdoor tobacco advertising illegal in up to 90% of the land area of the State's major cities, but still concluded that the regulations were adequately tailored because these were all "areas where children are more likely to be." Pet. App. 30a.

The court of appeals also rejected Petitioners' contention that the *indoor* advertising restrictions had not been shown to be narrowly tailored. The district court had invalidated these restrictions, largely because Respondent presented no evidence to support them other than to point to the FDA regulations, which did *not* regulate indoor advertising. Pet. App. 31a. The court of appeals expressed "misgivings" about the plausibility of Respondent's assumption that minors under five feet tall will not look above eye-level, but it nonetheless reversed the district court on this issue, holding that "such determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.*[3]

[3] For similar reasons, the Court of Appeals also rejected Petitioners' First Amendment challenge to the product display restrictions in § 21.04(2)(c), (d) and § 22.06(4)(c), (d). Pet. App. 35a-37a.

SUMMARY OF ARGUMENT

1. Section 5(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts Massachusetts' tobacco-advertising regulations. The First Circuit's conclusion that the regulations do not impose requirements "with respect to . . . advertising" within the meaning of § 5(b) disregards the FCLAA's text, its history, and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

a. Section 5(b) preempts any state law imposing a "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. 15 U.S.C. § 1334(b). The phrase "with respect to . . . advertising" embraces any law regarding, concerning, or referring to advertising. Because the Massachusetts regulations expressly restrict "advertising," they constitute a regulation "with respect to" advertising within the plain meaning of § 5(b). That "plain language" must be applied, the Court has held, "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Cipollone*, 505 U.S. at 521 (plurality) (quotation omitted). In this instance, no tenable basis exists for believing that Congress meant anything less than what it said.

b. Far from supporting a contrary interpretation, the Court's ERISA cases confirm this reading of § 5(b). While the Court has declined to hold that ERISA's preemption of all state laws "relat[ing] to" employee benefit plans extends to all legislation that could *indirectly* affect pension plans in some way, the Court has made clear that state laws involving *direct* regulation of ERISA plans "relate to" those plans within the meaning of the statute. *New York State Conference of Blue Cross & Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992). In the same manner, smoking-and-health-based requirements expressly directed to

tobacco "advertising" are regulations "with respect to" advertising and are therefore preempted by FCLAA § 5(b).

c. The First Circuit erred in holding that FCLAA preemption was limited to regulation of advertising content. The plain language of Section 5(b) preempts all smoking-and-health-based laws "with respect to . . . advertising," not just laws concerning the content of advertising. Congress knows how to limit the FCLAA's preemptive scope to content-based regulations, and in fact has done so in the past. It expressly did so in § 5(a), which preempts health-based regulation of the content of cigarette packaging, and it expressly did so in the pre-1969 version of § 5(b), which was similarly limited to preemption of the regulation of advertising content. The First Circuit's contrary view would read into the FCLAA a content limitation that Congress itself rejected over thirty years ago. And, in doing so, the First Circuit's interpretation would frustrate the FCLAA's purpose of "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514.

2. Massachusetts' tobacco-advertising regulations also violate the First and Fourteenth Amendments.

a. The First Circuit erred in assuming that all content-based restrictions on commercial speech should receive intermediate scrutiny. Because the government's greater power over commercial speech arises only as a consequence of its authority to regulate commercial transactions, "there is far less reason to depart from the rigorous review that the First Amendment generally demands" when the government engages in content-based regulation of commercial speech "for reasons unrelated to the preservation of a fair bargaining process." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality). The lesser protection for commercial speech does not mean that the government may make any content-based

distinction it wants, but only that it may regulate content based on the "characteristics of commercial speech that justif[y] depriving it of full First Amendment protection." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Under these standards, Massachusetts' regulations should receive, and cannot survive, strict scrutiny. There is no dispute that the tobacco advertising prohibited by Massachusetts is truthful and nonmisleading. Moreover, the challenged regulations are ~~not~~ based on the claimed elimination of particularized commercially harmful devices used in advertising tobacco. On the contrary, they are based on the censorial theory that *merely* by expressing a favorable message about tobacco, even the smallest storefront advertisement must be suppressed lest it be seen by minors who may get the wrong idea from it. Because Massachusetts' regulations are "directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed," the regulations strike at "the core of First Amendment values" and must be subjected to strict scrutiny. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 & n.28 (1977). These onerous regulations plainly cannot survive such scrutiny.

b. By suppressing virtually any outdoor advertisement that contains any favorable message about tobacco, the regulations also discriminate on the basis of viewpoint. That makes "the violation of the First Amendment . . . all the more blatant," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), and makes the case for applying strict scrutiny even more compelling. For this independent reason, the regulations receive, and fail to satisfy, strict scrutiny.

c. In any event, even under *Central Hudson* the regulations cannot survive. Massachusetts has not shown that its restrictions directly and materially advance its interest in curbing underage smoking. No study has examined whether, in light of the advertising restrictions contained in the Master

Settlement Agreement plus extensive state-sponsored anti-tobacco advertising, the regulations would do anything more than lend the most limited incremental support to Massachusetts' policies. Moreover, the availability of non-speech measures (*e.g.*, more vigorous enforcement of laws prohibiting tobacco sales to minors and outlawing underage purchases of tobacco products), combined with the sheer scope of the advertising ban (comprising some 90% of the most heavily populated areas of Massachusetts), demonstrate that the regulations are anything but "narrowly tailored."

ARGUMENT

I. Massachusetts' Severe Limitations on the Display of Cigarette Advertising Impose Requirements "With Respect to . . . Advertising" Within the Meaning of the Preemption Provision of the Federal Cigarette Labeling and Advertising Act.

In concluding that Massachusetts' advertising regulations were not preempted by § 5(b) of the FCLAA, 15 U.S.C. § 1334(b), the court of appeals held that the preemption of state regulations "with respect to the advertising" of cigarettes should be read only to apply to regulation of the *content* of cigarette advertising. Pet. App. 9a-13a. This construction of the FCLAA is inconsistent with the statutory text, the legislative history, and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (quotation omitted). Moreover, the First Circuit's reading of § 5 undermines Congress' purpose in enacting the FCLAA, which was to avoid the sort of crippling and nonuniform local regulations of tobacco advertising that have been upheld in this and other cases. Indeed, the lower court's restrictive reading of § 5 threatens to permit state regulations that prohibit almost all cigarette advertising—precisely what Congress sought to avoid. The decision below must be reversed.

1. The First Circuit's decision must be reversed for the simple reason that its construction of § 5(b) is inconsistent with the plain language of the statute.

a. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, establishes a comprehensive federal program concerning the advertising and promotion of cigarettes. In its current form, the Act requires that cigarette packages sold or distributed in the United States contain certain health warnings, *id.*, § 1333, bans radio and television advertising of cigarettes, *id.*, § 1335, confirms the authority of the Federal Trade Commission (FTC) to regulate "unfair or deceptive acts or practices in the advertising of cigarettes," *id.*, § 1336, and requires the FTC to submit annual reports to Congress concerning cigarette advertising, *id.*, § 1337. In crafting this federal statutory scheme, Congress chose to preempt *all* smoking-and-health-based State regulation "*with respect to*" cigarette "advertising." Section 5(b) of the Act provides in its entirety:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). Under the Supremacy Clause of Article VI of the Constitution, state laws that conflict with § 5(b) are "without effect." *Cipollone*, 505 U.S. at 516 (quotation omitted).

The court of appeals acknowledged that the Massachusetts regulations imposed "prohibition[s] based on smoking and health." Pet. App. 13a n.6. The court nonetheless held that the regulations were not preempted because the challenged restrictions on cigarette advertising did not impose requirements or prohibitions "with respect to . . . advertising." *Id.* at 10a-13a. The court held that "*with respect to*

advertising" means only regulations that "'impose *content and format requirements* on advertising information.'" *Id.* at 10a (quotation omitted) (emphasis added). Notwithstanding the breadth of the express statutory language, the court held that the phrase "with respect to . . . advertising" does not include regulations concerning "the *placement and manner* of outdoor advertising." *Id.* at 12a (emphasis added). The First Circuit's importation of this content/location distinction into § 5(b) is demonstrably wrong.

b. In construing the phrase "with respect to . . . advertising," one must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990). "If [a] statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

Thus, as this Court held in *Cipollone*, the "plain language" of § 5(b) must be given effect "'unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'" 505 U.S. at 521 (plurality) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part and dissenting in part) (an interpreting court must begin with the "ordinary meaning" of the statutory language) (quoting *FMC Corp.*, *supra*); *id.* at 548 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part) (stating that the language of § 5(b) "should be given its ordinary meaning") (citing *FMC Corp.*, *supra*; *Shaw*, *supra*).

The First Circuit's construction of § 5(b) cannot be reconciled with the statutory text. The Massachusetts regulations, by their terms, explicitly and directly restrict the

placement of cigarette "advertising." *See* 940 C.M.R. § 21.04(5), Pet App. 111a. Giving the statutory words and phrases their ordinary meaning, there can be no question that the regulations impose requirements and prohibitions "with respect to the advertising" of cigarettes. In common parlance, the phrase "with respect to" means "as regards," or "insofar as concerns," or "with reference to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1934 (1976). To say, as the First Circuit did, that Massachusetts' severe regulation of the placement of "advertising" does not *regard* or *concern* or *have reference to* "advertising" defies standard English usage and common sense. The First Circuit's contention that a direct regulation of "advertising" is not a regulation "with respect to . . . advertising" is "at odds . . . with the plain words" of the FCLAA, *Cipollone*, 505 U.S. at 521 (plurality), and disregards the "ordinary meaning" of the statutory language. *Id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ.).

c. The First Circuit sought support for its construction of § 5(b) in cases construing the preemption provision of ERISA (Pet App. 11a-12a). In fact, the ERISA analogy demonstrates the lower court's error.

Section 514(a) of ERISA preempts "all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court has observed that, because § 514(a)'s language is so "clearly expansive," one "might be excused for wondering, at first blush, whether the words of limitation ('insofar as they . . . relate') do much limiting." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Difficulty arises in cases where the party urging preemption asserts that the regulations, while not mentioning employee benefit plans, nevertheless have some *indirect* effect on such plans. All economic regulations have *some* effect, and thus "relate" in some way to, employee pension plans. Thus, the Court has struggled with defining the extent to which § 514(a) preempts

state laws that have only an *indirect* connection to, or effect on, ERISA plans. *See, e.g., Travelers*, 514 U.S. at 656.

Relying upon *Travelers*, the First Circuit concluded that, because the applicability of § 5(b) of the FCLAA turns on whether a state law imposes obligations "with respect to . . . advertising," it is "similar" to ERISA's broad preemption provision and likewise cannot be viewed with "'uncritical literalism.'" Pet. App. 11a-12a (quoting *Travelers*, 514 U.S. at 655). Having thus liberated itself from the confines of the text, the court of appeals felt free to decide for itself what sort of regulations should be preempted as inconsistent with congressional "policy" in enacting the FCLAA. Pet. App. 12a-13a.

To the extent § 514 of ERISA provides a useful analogy, it proves that the First Circuit's reading of § 5(b) was exactly wrong. As this Court noted in *Travelers*, the interpretive problem in ERISA preemption arises only for state laws that do *not* "make reference to" ERISA plans: in these cases, it can be difficult to define the point at which, even though the law does not target ERISA plans, it "produce[s] such acute, albeit indirect, economic effects, by intent or otherwise," that the law must be said to "relate to" ERISA plans. 514 U.S. at 668. By contrast, the Court has consistently held that state laws involving "direct regulation of ERISA plans" obviously "relate to" such plans and are preempted by § 514(a). *Id.*; *see also id.* at 656 (laws that "make 'reference to' ERISA plans" are preempted) (quoting *Shaw*, 463 U.S. at 96-97); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992) (challenged District of Columbia law "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted"); *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997) (noting that "it ha[s] not been necessary to rely on the expansive character of ERISA's literal language in order to find pre-emption" in cases

where "the state laws at issue . . . had a clear 'connection with or reference to,' ERISA benefit plans") (citation omitted).

Applying the same approach to § 5(b), there may well be room for debate as to when a state regulation not mentioning "advertising" has sufficient effect on advertising that it should be deemed to be a "requirement or prohibition . . . with respect to . . . advertising." *Compare Cipollone*, 505 U.S. at 524, 528 (plurality) *with id.* at 555 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part). But a state law—such as the Massachusetts regulations challenged here—that *specifically refers* to and regulates "advertising" plainly imposes obligations "with respect to . . . advertising" and is therefore preempted.

2. Apart from its utter disregard of the plain meaning of the phrase "with respect to . . . advertising," the First Circuit's construction of § 5(b) is inconsistent with the text and history of the FCLAA in several other respects.

First, the court of appeals' content/location distinction fails for the simple reason that nothing in the language of § 5(b) suggests that Congress intended the provision to apply only to state laws regulating the *content* of cigarette advertising. *See, e.g., Morales v. Trans World Airlines*, 504 U.S. 374, 385 (1992) (rejecting state attorney general's narrow reading of the preemption clause in 49 U.S.C. App. § 1305(a)(1) because "[h]ad the statute been designed to pre-empt state law in such a limited fashion," Congress would have chosen a narrower wording). Congress could have chosen to limit § 5(b) to state laws that impose requirements or prohibitions "with respect to the *content* of advertising," but it did not do so. Congress instead chose language that applies to state laws "with respect to . . . advertising" *simpliciter*. As this Court stated in construing § 5(b) in *Cipollone*, "'[w]e must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive

meaning.'" 505 U.S. at 521 (plurality) (quoting *Shaw*, 463 U.S. at 97). The First Circuit not only fails to give effect to the plain language, it effectively rewrites the statute, adding terms that Congress did not see fit to include. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993) ("[W]e may not add terms or provisions where Congress has omitted them.")

Second, the importation of a "content" limitation into § 5(b) cannot be reconciled with other provisions of the FCLAA. In its current version, § 5 contains a *second* preemption provision in subsection (a) that reads as follows:

> No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

15 U.S.C. § 1334(a). Unlike subsection (b), subsection (a) thus uses language referring explicitly to content, limiting its preemption to laws or regulations that require "statement[s]" on cigarette packages. The *absence* of such limiting language in the very next subsection of the statute, *i.e.*, in subsection (b), establishes that the latter provision was intended to mean what it says, extending preemption beyond mere regulation of content. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Third, the First Circuit's narrowing construction of the statute cannot be reconciled with Congress' amendments to the FCLAA. The significantly broader language in subsection 5(b) is not an accident. Congress chose to amend and expand the original, much narrower preemption provision first enacted in 1965. In its original form, § 5(b) did for advertising what subsection (a) did for product labeling. In language very

similar to subsection (a), the former § 5(b) only addressed regulation of *content* of advertising: "'[n]o *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes . . . .'" Pub. L. No. 89-92, § 5(b), 79 Stat. 282, 283 (1965) (emphasis added).

Effective July 1, 1969, however, Congress completely rewrote subsection (b), so that it now reaches beyond preemption of regulation of "*statements*" in advertising to preemption of any smoking-and-health-based regulation "*with respect to* . . . advertising." Pub. L. No. 91-222, §§ 2, 3, 84 Stat. 87, 88 (1970) (rewriting, *inter alia*, section 5 of the FCLAA). As this Court noted in *Cipollone*, the resulting preemptive effect is "much broader" and cannot be limited to laws regulating the content of advertising:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] . . . imposed under State law." *Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.*

505 U.S. at 520 (plurality) (emphasis added). The First Circuit's narrow and countertextual reading of § 5(b) must be rejected because it fails to give effect to these significant changes in the statutory language. *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992) (construction that fails to give effect to changes in language is strongly disfavored).

3. The First Circuit also sought to defend its countertextual construction of § 5(b) on the ground that state laws that do not regulate the *content* of cigarette advertising "do not interfere" with the "labeling and advertising scheme established by Congress" and therefore do not present the particular kind of "'diverse, nonuniform, and confusing' advertising standards

with which Congress was concerned when it enacted the FCLAA." Pet. App. 12a-13a. Thus, the court of appeals concluded that its rejection of the plain meaning of § 5(b) was supported by a "'fair understanding of congressional purpose.'" *Id.* at 9a (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)). This argument is unavailing.

The First Circuit's focus on whether the regulations "interfere" with federal policy is more appropriate for *implied* preemption cases than for the construction of an express preemption clause. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 1927 (2000) ("[T]his Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent, *and treats 'conflict' pre-emption as an instance of the latter.*") (emphasis added). By contrast, in construing *express* preemption provisions, the Court has consistently held that it is the language of the preemption provision that controls, not whether state law "interferes" with the purposes of the federal scheme. *See, e.g., Morales*, 504 U.S. at 386-87 ("Nothing in the language of § 1305(a)(1) suggests that its 'relating to' pre-emption is limited to *inconsistent* state regulation."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) ("The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements").

Even if the extent of "interference" were a relevant consideration, the court of appeals was wrong in concluding that the onerous "location" restrictions adopted by Massachusetts do not interfere with federal policy established by the FCLAA. Massachusetts' detailed advertising regulations frustrate the FCLAA's purpose of "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514. The 1969 Amendments to § 5(b) were adopted precisely "to avoid the

chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 at 12, *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. The First Circuit's decision sanctions precisely that chaos: as illustrated by the Appendix to the Petition in this case, there are now literally scores of different local ordinances that impose special restrictions only on tobacco advertising, impeding Congress' purpose in enacting the FCLAA. Pet. App. 128a-34a.

Moreover, the *Cipollone* Court noted that among the state proposals that led to the expansion of § 5(b)'s preemption clause was a proposed California statute that, *inter alia*, would have prohibited all print cigarette advertisements. 505 U.S. at 515 & n.11. As Justice Blackmun (joined by Justices Kennedy and Souter) observed in his separate opinion in *Cipollone*, the 1969 amendment to § 5(b) was intended, at a minimum, "to ensure that a State could not do through negative mandate (*e.g., banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements)." 505 U.S. at 539 (emphasis added). The decision below, approving a ban on outdoor advertising in up to 90% of Massachusetts' most heavily populated areas, undermines FCLAA policy by permitting States, under the guise of preventing children from viewing tobacco advertising, to impose precisely the sort of near-total bans that the FCLAA sought to forestall. JA 161-67.

4. The First Circuit also reasoned that a "content" limitation should be read into § 5(b) in order to preserve state police power in accordance with the "presumption against preemption." Pet. App. 10a-11a (quotation omitted). But in doing so, the court of appeals ignored this Court's holding in *Cipollone* that the "presumption against pre-emption" cannot be invoked *in disregard of the statutory text*. *Cipollone*, 505 U.S. at 523 (plurality) (notwithstanding any "presumption against pre-emption," the phrase "state law" in § 5(b) could not "fairly" be construed to exclude state common law); *id.* at 548-

49 (Scalia, J., joined by Thomas, J.) (agreeing that § 5(b) covered common law claims, but rejecting any presumption against preemption). To the extent that there is a "presumption against preemption," it can be invoked only when there is *textual* ambiguity that would warrant use of this canon of construction. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where the language is clear, there is "no reason . . . to resort to the canons of construction that we use to resolve doubtful cases"). Moreover, the First Circuit's argument on this score is something of a red herring. Section 5(b) does not impinge upon the traditional police power of States to adopt *general* regulations concerning the placement of advertisements. Section 5(b) limits the States' power to adopt tobacco-specific regulations "with respect to . . . advertising," a limitation that Congress had the power, and intended, to impose.

Similarly, the court of appeals was wrong in asserting that its construction of § 5(b) was necessary to ensure that Petitioners could be prevented "'from handing out free cigarettes in an elementary school yard.'" Pet. App. 10a (citation omitted). The hypothetical is, of course, counterfactual: as part of the resolution of the various lawsuits brought by state attorneys general, Petitioners have affirmatively acceded to the entry of permanent injunctions, in all 50 States, that specifically prohibit them from "target[ing] Youth" in the "advertising, promotion or marketing" of cigarettes. JA 260, 274.

The hypothetical is also, in any event, a straw man. In *Morales*, this Court confronted a similar parade of horribles. The Texas attorney general objected that a plain language reading of the Airline Deregulation Act's preemption clause would "lead[] to pre-emption of state laws against gambling and prostitution as applied to airlines" and might "give the airlines *carte blanche* to lie to and deceive consumers." 504 U.S. at 390. The Court rejected this argument, noting that,

first, it was doubtful whether such laws would be preempted and, second, the Federal Government retained authority to prescribe any such conduct. *Id.* at 390-91. Both points are relevant here. It is questionable whether the term "advertising," as used in § 5(b), would be thought to include direct and intentional solicitation of *unlawful* sales, and thus there is no reason to believe that state laws prohibiting the distribution of cigarettes to minors would be preempted. Moreover, Congress has made clear that regulation related to the perceived impact of cigarette advertising on minors is to be addressed at the federal level. As originally enacted in 1965, § 5(b) prohibited *both* state and federal agencies from regulating the content of cigarette advertising. This provision was criticized as providing "no meaningful defense" against advertising "designed to make cigarette smoking appeal[] to young people." *See* S. Rep. No. 91-566 at 19, 1970 U.S.C.C.A.N. at 2667. Congress responded, *not* by restoring power to the States, but by accelerating the phase-out of most of the 1965 Act's limitations on the jurisdiction of the Federal Trade Commission. *See* Pub. L. No. 91-222, § 2, 84 Stat. at 89 (amending, *inter alia*, § 7 of the FCLAA) (codified, as later amended, at 15 U.S.C. § 1336). As in *Morales*, Congress' deliberate and express retention of federal authority in the area is sufficient to refute the court of appeals' reliance on a parade of horribles. 504 U.S. at 390-91. The First Circuit's argument reduces to the view that it would be better if Congress had not preempted States in this area. Congress thought otherwise, and its word in the FCLAA controls.

* * *

There is "no 'good reason to believe' that Congress meant less than what it said [in § 5(b)]." *Cipollone*, 505 U.S. at 522 (plurality). The court of appeals erred in holding otherwise, and its judgment should be reversed.

II. In Broadly Banning Speech Promoting Tobacco Products, the Massachusetts Regulations Violate the First and Fourteenth Amendments.

The court of appeals also erred in rejecting Petitioners' First Amendment challenge to the Massachusetts advertising restrictions. Although Massachusetts had several alternative regulatory tools available to assist in reducing the incidence of youth smoking—including stricter enforcement of existing prohibitions against *sales* of tobacco to minors or enactment of a prohibition against *purchases* of tobacco by minors—the State instead chose to adopt what amounts to a near-total ban on the public display of truthful tobacco advertisements.[4] This action was taken by a single state official, the Attorney General, as part of his self-declared "war against Big Tobacco." JA 248. Applying the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the First Circuit upheld this heavy-handed approach, dismissing the near-elimination of public tobacco

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[4] While Massachusetts (like most States) already precludes retailers from selling tobacco products to minors, Mass. Gen. Laws Ann. ch. 270, § 6A (West 2000), it lags behind the many other States that have enacted laws that prohibit minors from purchasing tobacco. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3622 (West 2000) (illegal for minors to purchase cigarettes); Cal. Penal Code § 308 (same). Massachusetts also has yet to implement a retailer licensing scheme, similar to the program for alcoholic beverages, that would closely regulate retail sales of tobacco. Other States have adopted such measures, *see, e.g.*, Minn. Stat. § 461.12 (2000), and Respondent himself concedes that it could "drastically reduce the sale of tobacco products to minors." 1st. Cir. JCA 2937. Moreover, although strict enforcement of age verification has been shown to sharply reduce the ability of minors to purchase cigarettes, *see, e.g.*, H. Landrine, *Asking Age and Identification May Decrease Minors' Access to Tobacco*, 25 Preventive Medicine 301-06 (1996) (California study showed that age verification resulted in refusal of sales to minors 99% of the time), the Attorney General did not wait for the age-verification elements of the new regulations to be implemented before adopting speech restrictions.

advertising to adults as amounting merely to "ordinary commercial speech regulation[]." Pet. App. 16a n.8.

The court of appeals' analysis fails for two reasons. First, the court erred in applying *Central Hudson*'s "intermediate scrutiny" standard to Massachusetts' advertising regulations. Those regulations impermissibly regulate the content of commercial speech based solely on its expression of an idea—namely, *any* favorable speech concerning tobacco products—rather than on any particular commercial aspect of the speech that directly threatens the integrity or legality of the transactions proposed. Indeed, because the regulations explicitly suppress, over a wide geographic area, any public expression of disfavored messages that promote the use of tobacco, the regulations are viewpoint-discriminatory in their operation and effect. Second, even under the *Central Hudson* test, Massachusetts has failed to establish that its severe advertising restrictions will materially reduce underage tobacco use or that the uncommon breadth of these regulations has been properly tailored to that objective. For these reasons, the regulations plainly violate the First Amendment.

A. Strict Scrutiny Governs Massachusetts' Impermissibly Content-Based Restrictions on Commercial Speech.

The court of appeals held that Massachusetts' suppression of tobacco advertising in as much as 90% of the largest cities in the State was an "ordinary commercial speech regulation[]" warranting only intermediate scrutiny under *Central Hudson*. Pet. App. 16a & n.8. That was wrong. Under the First Amendment principles set forth in this Court's cases, the appropriate level of review is strict scrutiny; and because the regulations plainly do not survive such scrutiny, they must be invalidated.

1. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the

expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Because content-based regulation of speech "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991), the Court has stated that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

The Court has, however, adhered to a "limited categorical approach" in this area, holding that there are certain categories of expression in which the prohibition against content discrimination "applies differently" than it does "in the area of fully protected speech." *R.A.V.*, 505 U.S. at 383, 387. These "few limited areas" consist of certain categories of speech that have traditionally been thought to be wholly outside the protection of the First Amendment (such as libel, "fighting words," and obscenity), *id.* at 383; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 n.7 (1983), and one category—commercial speech—that enjoys a "measure of First Amendment protection" that "is not absolute." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995); *see Bolger*, 463 U.S. at 65.

The more limited protection afforded to commercial speech arises largely from the fact that, by definition, it "is linked inextricably to commercial *activity*" that the government has power to regulate. *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) (emphasis added); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions"); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[T]he State's interest in regulating the underlying transaction may give it a concomitant interest in

the expression itself."). In particular, the government's power to protect the fairness and integrity of commercial transactions has traditionally been thought to include the ability to impose restrictions against "[a]dvertising that is false, deceptive, or misleading" or that proposes "transactions which are themselves illegal." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58, 462 (1978). It is precisely because of this "greater potential for deception or confusion in the context of certain advertising messages" that "content-based restrictions on commercial speech *may* be permissible." *Bolger*, 463 U.S. at 65 (emphasis added).

Nonetheless, the idea that commercial speech is afforded more limited protection against content discrimination "must be taken in context." *R.A.V.*, 505 U.S. at 383. The power to proscribe particular speech "on the basis of *one* content element . . . does not entail the power to proscribe it on the basis of *other* content elements." *Id.* at 386 (emphasis in original). Thus, the lesser protection for commercial speech means not that the government may make *any* content-based distinctions it wants, but only that it may regulate content based on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection." *Id.* at 388. Where the government engages in content-based regulation of commercial speech "for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart*, 517 U.S. at 501 (plurality). Put simply, "[t]he State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated,' rather than the 'commercial aspect of [it]—with offerors communicating offers to offerees.'" *Id.* at 499 (quoting *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 96 (1977)).

Accordingly, the government has greater power to regulate the content of commercial speech only when it "regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information." *44 Liquormart*, 517 U.S. at 501 (plurality). By contrast, where the government's content discrimination is "directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression," the regulation strikes at "the core of First Amendment values" and is presumptively unconstitutional. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 n.28 (1977); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment[.]").

The fundamental First Amendment principles at work here are well illustrated by *R.A.V.*, in which the Court addressed a city ordinance banning "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391. The Court invalidated the ordinance as impermissibly content-based because it selectively prohibited only those fighting words "addressed to one of the specified disfavored topics." *Id.* In response to the argument that the unprotected status of "fighting words" meant "that the government 'may regulate [them] freely,'" *id.* at 384, the Court held that "the power to proscribe [speech] on the basis of *one* content element . . . does not entail the power to proscribe it on the basis of *other* content elements." *Id.* at 386 (emphasis in original). Thus, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Of particular note here is the fact that the Court explicitly observed that the same limitation would apply in the commercial speech context:

> [A] State may choose to regulate *price* advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection), is in its view greater here. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Id. at 388-89 (emphasis added) (citation omitted). Indeed, it could not be otherwise: if, as *R.A.V.* held, these restrictions on content discrimination apply to entirely unprotected categories of speech, they must also apply to commercial speech, which *is* protected.

The resulting limitation on the ability of the government to regulate commercial speech based on its content is fully consistent with the rationale of the general prohibition against content discrimination. *Simon & Schuster*, 502 U.S. at 116. If the basis of the government's content-based regulation of commercial speech "consists entirely of the very reason the entire class of speech at issue" is only entitled to lesser constitutional protection, "no significant danger of idea or viewpoint discrimination exists." *R.A.V.*, 505 U.S. at 388. "Such a reason, having been adjudged neutral enough" to justify depriving commercial speech of full First Amendment protection, "is also neutral enough to form the basis of distinction within the class." *Id.* Accordingly, when the government regulates commercial speech to protect consumers from misleading practices or requires beneficial disclosures, "the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart*, 517 U.S. at 501 (plurality).

By contrast, where the government imposes a content-based restriction for reasons unrelated to the justification for according the speech lesser or no constitutional protection

(*e.g.*, a law prohibiting "obscenity which includes offensive political messages," *R.A.V.*, 505 U.S. at 388), the neutral reasons for treating the category of speech in question differently from fully protected speech do not support the government's classification. In such circumstances, the censorship concerns raised by content-based restrictions attach with full force, and the restriction must be subject to strict scrutiny. *See, e.g.*, *44 Liquormart*, 517 U.S. at 503 (noting that prohibitions on "truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching" and instead "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth"); *cf. R.A.V.*, 505 U.S. at 382, 393-94 (concluding that St. Paul's ordinance banning certain categories of fighting words was "presumptively invalid" because it "create[d] the possibility that the city is seeking to handicap the expression of particular ideas").

2. Against the backdrop of these settled principles, the First Circuit's holding that *Central Hudson* provides the one-size-fits-all approach for evaluating commercial speech restrictions cannot be sustained. Under the court of appeals' erroneous view, First Amendment law would now contain the following remarkable anomaly: content-based distinctions among categories of *protected* truthful and nonmisleading commercial speech are to be judged under *Central Hudson*'s "intermediate scrutiny" standard, while (under *R.A.V.*) content-based distinctions among *unprotected* categories of speech are afforded strict scrutiny. 505 U.S. at 395 (holding that the St. Paul ordinance is not "narrowly tailored to serve compelling state interests").

There are yet further anomalies. This Court has, on more than one occasion, explicitly recognized that the *Central Hudson* test is "very similar" to the intermediate scrutiny standard used to determine "the validity of time, place, or manner restrictions." *United States v. Edge Broad. Co.*, 509

U.S. 418, 430 (1993); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). But the test for determining the constitutionality of a time, place, and manner restriction *presupposes* that the restriction is *content-neutral, i.e.*, that it is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980). Indeed, the Court has made clear that the absence of impermissible content-based discrimination is critical to the application of intermediate scrutiny: in *Ward*, the Court explained that it is precisely *because* time, place, and manner restrictions must be content-neutral that "the same degree of tailoring is not required of these regulations." 491 U.S. at 798 n.6. It is therefore obvious that intermediate scrutiny is neither designed, nor is it well-suited, to detect impermissibly content-based speech restrictions.

It is little wonder that a majority of the members of this Court have expressed misgivings about applying *Central Hudson* to the sort of commercial speech restrictions that raise the specter of impermissible content discrimination. In *44 Liquormart*, three Justices stated that intermediate scrutiny should not be applied to a commercial speech restriction if it regulates content "for reasons unrelated to the preservation of a fair bargaining process." 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.). Justice Thomas has likewise indicated that intermediate scrutiny is wholly inappropriate when the government uses commercial speech restrictions not to guard against "false or misleading advertising," but instead to "manipulat[e] consumer choices or public opinion through the suppression of accurate 'commercial' information." *Id.* at 520 (Thomas, J., concurring). And Justice Scalia has stated that he "share[s] Justice Thomas's discomfort with the *Central*

Hudson test." *Id.* at 517 (Scalia, J., concurring).[5] The common thread in these criticisms is clear: all of these Justices have expressed concerns about applying intermediate scrutiny to a restriction that regulates content based on characteristics of commercial speech *other* than those "that justif[y] depriving it of full First Amendment protection." *R.A.V.*, 505 U.S. at 388.

The skepticism expressed by these Justices about applying *Central Hudson* across-the-board to commercial speech restrictions is well founded, for *Central Hudson* itself indicated that "special care" would be required in reviewing certain types of commercial speech restrictions. In particular, *Central Hudson* stated that more careful review is required for "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566 n.9. While nonetheless establishing a "four-step analysis" for evaluating seemingly all commercial speech restrictions, *id.* at 566, *Central Hudson* noted that restrictions that involve wholesale suppression of ideas are unlikely ever to be constitutional: "[T]his Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, *either because it was deceptive or related to unlawful activity*." *Id.* (emphasis added).

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[5] These concerns echo and expand upon concerns expressed previously by Justices Brennan, Marshall, and Blackmun. *See Central Hudson*, 447 U.S. at 573 (Blackmun J., joined by Brennan, J., concurring) (noting that the majority's test "does not provide adequate protection for truthful, noncoercive commercial speech concerning lawful activities"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431, 436 (1993) (Blackmun, J., concurring) (suggesting that "truthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection"); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 350 (1986) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting) ("I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.").

Moreover, the traditional explanations for distinguishing commercial from political expression do not apply when the government adopts content-discriminatory restrictions on the expression of truthful ideas in commercial advertising. The fact that commercial speech frequently is objectively "verifiable" by the speaker, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976), may supply a basis for providing greater deference to the government in proscribing false commercial speech than, say, false political speech, *compare New York Times v. Sullivan*, 376 U.S. 254 (1964). But it hardly provides a warrant for diluting review of facially discriminatory restrictions on truthful ideas in commercial speech. And even if "commercial speech may be more durable than other kinds" in view of the economic considerations that often surround it, *Virginia State Bd.*, 425 U.S. at 771 n.24, it does not follow that facially discriminatory restrictions on nonmisleading ideas pose "little likelihood" that commercial speech will be "chilled" or "forgone entirely," *id.* One glance at Massachusetts' unfolding regulatory regime proves the ease with which unchecked suppression of one form of commercial speech carries the risk that this perspective will in fact be "forgone entirely."

Accordingly, the Court should clarify that *Central Hudson*'s "intermediate scrutiny" standard applies only when the government regulates advertising based on those particular commercial aspects of the speech that justify affording lesser constitutional protection to commercial speech in the first place. In such a circumstance, the regulation would be content-based, but *permissibly* so. *R.A.V.*, 505 U.S. at 388; *44 Liquormart*, 517 U.S. at 501 (plurality). Where, by contrast, the government seeks to regulate commercial speech based on "the ideas conveyed and [the] form of expression," strict scrutiny must be applied. *Carey*, 431 U.S. at 701 n.28. *See also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (invalidating challenged ordinance that discriminated

against commercial speech, noting that "the principal reason for drawing a distinction between commercial and noncommercial speech," preventing commercial harms, "ha[d] little, if any application" to the challenged local ordinance).

3. Under these standards, it is clear that the Massachusetts regulations are impermissibly content-based and must be subjected to strict scrutiny.

On the record before this Court, there is no dispute that the advertising prohibited by Massachusetts' regulations is truthful and nonmisleading. Pet. App. 17a. Nor can there be any doubt that the regulations discriminate on the basis of content. By their terms, the regulations apply to "any oral, written, graphic, or pictorial statement or representation . . . the purpose or effect of which is to *promote the use or the sale of the [tobacco] product*." 940 C.M.R. § 21.03 (emphasis added). As the First Circuit noted, because "[a]dvertising of other products is not restricted by the regulations," their focus "is plainly content-based." Pet. App. 14a.

Moreover, Massachusetts' restrictions on outdoor tobacco advertising are not based on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection." *R.A.V.*, 505 U.S. at 388. There is no claim that Massachusetts' content-discriminatory regime regulates any particular aspects of tobacco advertising that have been shown to have a tendency to mislead or to coerce consumers, thereby disrupting the "fair bargaining process" in commercial transactions. *Cf. 44 Liquormart*, 517 U.S. at 501 (plurality). Nor is this a case in which the government has identified a particular advertising device that is intentionally and uniquely targeted to children, thereby directly threatening the legality of the transactions proposed. *Cf. Carey*, 431 U.S. at 701. On the contrary, it is uncontested that Massachusetts' blunderbuss approach is based on the notion that the *mere* expression of

any favorable idea concerning a tobacco product—in any manner—in most public areas is inherently harmful.

Both the First Circuit and the district court below placed great emphasis on the fact that the Attorney General purports to have been motivated by concerns about the effect of tobacco advertising on children. But this subjective motivation, however worthy, cannot obscure the fact that the Attorney General's chosen *means* of accomplishing this end was to enshrine in state law the censorial theory that virtually no public display of favorable images of tobacco will be permitted in Massachusetts. The State has already obtained, in the MSA, a consent decree—backed up by potentially severe civil and criminal contempt sanctions—that explicitly forbids the "targeting" of youth in advertising, the use of any advertising device whose "primary purpose" is "to initiate, maintain or increase the incidence of Youth smoking within the State of Massachusetts," or the use of a "cartoon" in cigarette advertising. JA 260. By contrast, the challenged regulations are not based on the claimed elimination of particularized commercially harmful devices used in advertising tobacco; rather, they are based on the theory that, *merely* by expressing a favorable message about cigarettes, cigars, or smokeless products, even the smallest tobacco advertisement on a storefront will give any children who may happen to see it the wrong idea and therefore must be suppressed from public view. This is not commercial regulation; it is the regulation of an idea pure and simple.

The point is well illustrated by *Carey*, in which the Court rejected an argument virtually identical to the one made by Massachusetts here. In *Carey*, the Court invalidated a prohibition on the advertising and display of contraceptives, and the State made a comparable argument that its restrictions merely regulated speech based on a desire to protect children. 431 U.S. at 701. The Court squarely held that the professed desire to protect children from favorable messages about a

controversial product was insufficient to save the State's suppression of such speech. In *Carey* (as in this case), the regulations did not purport to identify any particular *subclass* of advertising that can be shown to directly incite imminent lawless action by minors, *see id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)), but instead treated all contraceptive advertising with the same broad brush. And in *Carey* (as in this case), the challenged provisions prohibited, in a broadly defined geographic area, the display of *any* advertising of the product, including advertising that "merely state[s] the availability of products and services that are . . . entirely legal." 431 U.S. at 701. After noting that the State's prohibition of contraceptive advertising could not be justified as a commercial regulation, the Court explicitly stated that the State's professed concern about children's reaction to the public expression of ideas about a controversial product was a frank concession that the speech was *not* being regulated based on its uniquely commercial aspects:

> [The State] suggest[s] no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising *but at the ideas conveyed* and form of expression—the core of First Amendment values.

Carey, 431 U.S. at 701 n.28 (emphasis added). That is precisely the case here, and the challenged regulations necessarily fail. *See also Linmark*, 431 U.S. at 93-94 (prohibition on "for sale" signs in front of homes was not "unrelated to the suppression of free expression" but was instead premised on the communicative effect of the message's content).

The impermissible nature of the State's content-discrimination is all the more apparent when one considers the extraordinary sweep of the restrictions, which greatly magnifies the concerns over possible censorship of disfavored ideas. While invoking the specific aim of protecting children from tobacco-related messages, the Attorney General has imposed restrictions that effectively deprive many local retailers of the ability to market tobacco products to adults who may lawfully purchase and use them. Although any number of products that may only be lawfully purchased by adults (such as alcohol) pose health risks for children, the Attorney General has imposed his broad advertising prohibitions *only* on tobacco products.

By prohibiting outdoor tobacco advertising in all but a marginal portion of the State's most populated areas, the Attorney General's regulations deny adults the opportunity to decide whether to ignore, accept, act upon, or reject tobacco messages from local stores, marts, and gas stations. The extraordinary sweep of the Attorney General's regulations extends the state's paternalistic anti-smoking policy to adults as well as children, even though smoking is perfectly legal for adults. The regulations operate to "prevent men and women from hearing facts that might not be good for them," *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) and can be justified only "based on the benefits of public ignorance," *Bates*, 433 U.S. at 375. Strict scrutiny is therefore appropriate, and the extraordinary breadth of the regulations plainly confirms that they cannot survive such scrutiny. *Cf. United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 1886-87 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").

B. The Regulations Also Are Viewpoint-Discriminatory In Nature And Warrant Strict Scrutiny For This Independent Reason As Well.

The singular sweep and severity of the regulations, together with the State's own expressions of opinion regarding tobacco products, demonstrate that there is more than a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. The transparent objective of the Massachusetts regulations is not just to regulate a category of speech but to "drive . . . viewpoints from the marketplace," *id.* at 387 (quotation omitted), that are inconsistent with the State's. That makes the violation of the First Amendment all the more "egregious," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 830-31 (1995), and makes the case for declining to apply *Central Hudson* to this setting all the more compelling.

One "freedom of speech" principle surpasses every other: government may not "favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829.

This case presents not just the risk, but the fact, of viewpoint discrimination. Doubtless, the State is free to publicize its own views about cigarettes, but in doing so it may not "prohibit, edit, or restrain the distribution of advocacy materials" offering a different view. *Meese v. Keene*, 481 U.S. 465, 480 (1987). And that is precisely what the State has done.

The facts of this case make clear that the State's actions are designed in part to suppress a viewpoint with which the State disagrees. In banning advertisements that promote the sale of tobacco products, for example, these regulations represent the

culmination of one State's "war against Big Tobacco." JA 248. Even the most aloof observer would find it difficult to discern where the political nature of such speech restrictions ends and the commercial nature of the regulations begins.

Making matters worse, the Massachusetts regulations silence not just one alternative viewpoint but a multiplicity of viewpoints. Whether it be large tobacco companies or small ones, companies with new products or companies with old ones, or the smallest retailers or the largest distributors, each has a different interest in a free flow of truthful information on this subject. Yet because each of these different viewpoints expresses something favorable about a tobacco product (whether it be taste, price, etc.), each differs from the orthodoxy prescribed by the State, and they are all substantially suppressed. And it is of course too late in the day to argue "that no viewpoint discrimination occurs because the [regulations] discriminate against an entire class of viewpoints." *Rosenberger*, 515 U.S. at 831-32. That position "reflects an insupportable assumption that all debate is bipolar" and constitutes "a contrived description of the marketplace of ideas." *Id.* at 831.

The court of appeals gave insufficient weight to the viewpoint-discriminatory nature of Massachusetts' regime. In finding no "danger of viewpoint discrimination," the lower court noted that the regulations apply to all tobacco products "regardless of brand or manufacturer"; that they "permit nonpromotional speech relating to tobacco products"; and that "[t]he companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions." Pet. App. 15a-16a. But it is hardly reassuring to observe that Massachusetts has not applied the regulations in a discriminatory manner: who needs to *apply* provisions discriminatorily when the provisions already discriminate *on their face*? That the regulations prohibit only speech that "promotes" tobacco consumption, *see* 940 C.M.R. § 21.03

(Pet. App. 107a), while permitting both "nonpromotional" and commercial speech that discourages tobacco consumption, *see* Pet. App. at 14a (allowing "tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns"), is precisely why they *are* viewpoint-based. The Court has never rejected the argument that anything less than strict scrutiny applies to such transparent censorship. It should not do so here.

C. Massachusetts' Near-Total Ban On Outdoor and Indoor Tobacco Advertising Fails *Central Hudson*.

Even if the Court were to apply intermediate scrutiny under *Central Hudson*, the Massachusetts regulations still violate the First Amendment. More particularly, Massachusetts has failed to satisfy the last two elements of the *Central Hudson* test—*i.e.*, that the regulatory measure "directly advances" the government's interests and that it be no "more extensive than is necessary." 447 U.S. at 566.

1. The State bears the burden of demonstrating that its speech ban "advances [its] interests in a direct and material way." *Edenfield*, 507 U.S. at 767; *Central Hudson*, 447 U.S. at 564. "[M]ere speculation or conjecture," the Court has emphasized, will not suffice. *Edenfield*, 507 U.S. at 770. Nor will a justification that "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73. Rather, the State "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. Otherwise, "'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 771); *accord Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 (1999).

Measured against this test, the State's showing plainly fails. In arguing that its ban directly advances the objective of curbing underage smoking, it points principally to a 1994 Surgeon General's report and the background statement accompanying the FDA's now-invalidated (*see FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000)) regulation of tobacco advertising. Pet. App. 26a-27a; *see* JA 187-209, 225-38. The First Circuit gave these materials only the most cursory attention, "declin[ing] to summarize" their content and simply announcing, without amplification, that they are "sufficient to satisfy the Attorney General's burden." Pet. App. 27a. They are not.

On their face, Massachusetts' submissions do not purport to demonstrate a causal link between cigarette advertising and the initiation of illegal youth smoking. JA 204 ("To date, . . . no longitudinal study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature."); JA 229 ("[N]one of these studies individually is sufficient to . . . [e]stablish that advertising has an effect of directly causing minors to use tobacco products."). *See also* JA 135-44 (Morse Aff.), 145-61 (Henke Rep.). Nor can Massachusetts overcome this deficiency merely by pointing to studies purporting to establish that advertising generally increases demand for tobacco products. Even "[a]ssuming the accuracy of [a] causal chain" between advertising and the incidence of smoking,[6] "it does not necessarily follow that the

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[6] The expert testimony and accompanying studies submitted by Petitioners demonstrated that there is no substantial relationship between the challenged advertising and overall smoking rates; the effect of the advertising is primarily to shift or preserve the brand loyalties of persons who already smoke. JA 147-51. Thus, for example, Petitioners pointed out that tobacco consumption in three countries with advertising bans (Canada, Norway, and Finland) did not decline after those bans were instituted. JA 159-60. Petitioners' experts also exhaustively surveyed the academic literature and concluded that "tobacco advertising and

[State's] speech ban has directly and materially furthered the asserted interest" in curbing illegal youth smoking. *Greater New Orleans Broad.*, 527 U.S. at 189. Massachusetts utterly failed to show that its proposed advertising restrictions would have any material impact on underage tobacco use, especially in light of the new restrictions already imposed by the MSA.

The MSA (JA 259-71) already places considerable restrictions on cigarette companies' advertisements. Among other things, the MSA says that Petitioners may not: display any advertising "outdoors, or . . . on the inside surface of a window facing outward" unless the advertising "does not occupy an area larger than 14 square feet" (MSA §§ II(ii), III(d), JA 259-60, 263-64). On top of this, the MSA contemplates that the States will oversee extensive advertising regarding the risks of youth smoking. *See id.*, § III(d)(3), JA 264; *id.*, § VI, 1st Cir. JCA 3372-79.

In the face of these measures, it is difficult to credit the State's claim that its additional advertising restrictions —eliminating all remaining outdoor signs, which are less than 14 square feet in size—will provide anything but the most "marginal degree of protection" against underage smoking. *Bolger*, 463 U.S. at 73. No study or any other evidentiary support demonstrates that the Attorney General's additional measures will achieve an additional "significant reduction" in underage smoking. *44 Liquormart*, 517 U.S. at 506-07 (plurality). And, in truth, the record confirms that the State never even considered studying the efficacy of these other measures. On the very day the State elected to join the MSA, the Attorney General announced his intention to promulgate these additional regulations. *See* JA 251. Quite plainly, the

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promotion plays no material role in the decision of minors to begin using tobacco products." JA 139, 152. Rather, factors such as family influence and peer pressure principally determine whether minors will become smokers. JA 139, 152-53.

State's rush to place these additional speech restrictions on tobacco advertising was not based on any evidence that these measures would lend anything more than "limited incremental support" to the asserted goal of reducing underage smoking. *Bolger*, 463 U.S. at 73. The regulations should be invalidated on this independent ground.

2. In addition to violating *Central Hudson*'s third prong, the Massachusetts regulations also violate its fourth. They simply do not reflect the precision that this aspect of the test requires. Instead of demonstrating that the State "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition," *Discovery Network*, 507 U.S. at 417, the regulations amount to exactly the kind of scattershot legislation that the Court has not hesitated to invalidate in the past.

Central Hudson places the burden on the government to establish a "close fit" between the ends and means of its speech-restrictive regulations. 447 U.S. at 418. "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech," *Central Hudson* instructs, "the excessive restrictions cannot survive." *Id.* at 564-65, 569. Because "the First Amendment directs that government may not suppress speech as easily as it may suppress conduct," the Court has alerted States that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *44 Liquormart*, 517 U.S. at 512 (plurality). Thus, where options are "availabl[e] . . . , all of which could advance the [g]overnment's asserted interest in a manner less intrusive to . . . First Amendment rights," a speech restriction is "more extensive than necessary" and more extensive than is constitutionally permissible. *Rubin*, 514 U.S. at 491; *Discovery Network*, 507 U.S. at 418 & n.13 ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant

consideration in determining whether the 'fit' between ends and means is reasonable.").

In applying this requirement, the Court has upheld restrictions that left open "many alternative channels for communicating necessary information" about the product or service. *Went For It*, 515 U.S. at 633-34. But it repeatedly has invalidated restrictions where no such "alternative channels" were readily available. *See, e.g., 44 Liquormart*, 517 U.S. at 501-02 (plurality); *id.* at 529-30 (O'Connor, J., concurring in the judgment); *Linmark*, 431 U.S. at 92-94.

These requirements cannot be satisfied here. For the ostensible purpose of discouraging underage smoking, the State has enacted what is tantamount to a complete ban on outdoor advertising of cigarettes. The regulations ultimately prohibit outdoor advertising (and indoor advertising that is visible to passers-by) in 90% of the three most heavily-populated areas of Massachusetts. *See* 940 C.M.R. § 21.04(5), Pet. App. 111a; *id.*, § 22.06(5), Pet. App. 123a.

Far from being "narrowly drawn," the regulations overlook numerous "practical and nonspeech-related forms of regulation" that "could more directly and effectively" accomplish the professed goal of reducing underage smoking. *Greater New Orleans Broad.*, 527 U.S. at 192. The State did not have "to choose suppression over a less speech-restrictive policy." *44 Liquormart*, 517 U.S. at 509. It could have, *inter alia*, (1) strictly enforced its laws prohibiting retailers from selling cigarettes to underage buyers; (2) enacted laws making underage purchases of cigarettes illegal; (3) imposed a licensing requirement on retailers as a means of supervising compliance with existing tobacco sales laws; and (4) enforced the prohibition against smoking on school grounds.

Moreover, as noted, the MSA provides that no cigarette manufacturer "may take any action, directly or indirectly, to target Youth within any Settling State in the advertising,

promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State." MSA, § III(a), JA 260. If the State believed that a cigarette manufacturer had failed to comply with these requirements, it could "bring an action . . . to enforce" them. *Id.*, § VII(c), 1st. Cir. JCA 3380. On its face, the MSA thus refutes the State's "contention that the potential [problems associated with underage smoking] cannot be combated by any means short of a blanket ban." *Zauderer v. Office of Disciplinary Counsel of S. Ct. of Ohio*, 471 U.S. 626, 648 (1985).

The Court has repeatedly held that the availability of these types of alternative regulations render a commercial speech-restriction unconstitutional. *See 44 Liquormart*, 517 U.S. at 507 (plurality); *id.* at 529 (O'Connor, J., concurring in judgment); *Rubin*, 514 U.S. at 491. Each of these alternatives is consistent with the First Amendment's command that appropriate private and public decisions be reached by keeping "open the channels of communication rather than . . . [by] clos[ing] them." *Virginia State Bd.*, 425 U.S. at 770; *see also 44 Liquormart*, 517 U.S. at 498 (plurality). *Cf. Carey*, 431 U.S. at 700 (statute that "completely suppress[es]" information about a product is unconstitutional) (citation omitted).[7]

Nor was the court of appeals correct in saying that the 1,000-foot radius was narrowly tailored because some of the Petitioners previously had agreed to refrain from *billboard*

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[7] The Court invalidated the statute in *Carey* to the extent that it prohibited the "advertisement or *display*" of contraceptives. *See* 431 U.S. at 700 (emphasis added). Accordingly, the same First Amendment principles that require invalidation of the outdoor and indoor advertising restrictions require invalidation of the display regulations at issue in this case. *See* 940 C.M.R. §§ 21.04(2)(c), (d), Pet. App. 109a; *id.*, § 22.06(2)(c), (d), Pet. App. 121a.

advertising within a 500-foot radius of schools. Pet. App. 31a. Doubling the radius covered by the regulations, however, causes the associated areas to increase *fourfold*. Accordingly, if a 1,000-foot radius would foreclose advertising across 90% of a metropolitan area, a 500-foot radius would generally only foreclose advertising in less than 22% of the same area. And the regulations prohibit signs of any size, including ones that cannot possibly be seen from 1,000 feet (or even 500 feet). Contrary to the view of the court of appeals (Pet. App. 31a), this increase in speech suppression cannot be blithely dismissed as "splitting hairs." Otherwise, the essential concept of narrowly tailoring has lost all meaning.

That leaves the final ground for the court of appeals' decision—the view that it could sidestep these draconian requirements by claiming that they are necessary to protect children. Despite the importance of insulating minors from certain products, the Court has specifically held that commercial speech restrictions may not "'reduce the adult population . . . to reading only what is fit for children.'" *Bolger*, 463 U.S. at 73-74 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In *Bolger*, the Court invalidated a federal statute prohibiting unsolicited mailed advertisements for contraceptives. Acknowledging the importance of the governmental interest in protecting children from these advertisements, the Court nonetheless concluded that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74. Quoting Justice Frankfurter, the Court reasoned that banning commercial speech about a product lawful for adults, in order to protect children from exposure to the product, would surely "'burn the house to roast the pig.'" *Id.* at 74 n.27 (quoting *Butler*, 352 U.S. at 383). Similarly, *Carey v. Population Servs. Int'l, supra*, invalidated a state law prohibiting advertisements for contraceptives. In rejecting an argument that such advertisements "would legitimize the sexual activity" of

children, the Court responded that this was "classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment." 431 U.S. at 701.

The Court repeatedly has applied this same principle to invalidate broad restrictions on indecent speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court relied on *Bolger* in invalidating a federal statute that severely restricted Internet indecency. *Id.* at 875. In *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court relied on *Bolger* to invalidate a federal law severely restricting cable broadcast indecency, despite recognizing that "[n]o provision . . . short of an absolute ban, can offer certain protection against assault by a determined child." *Id.* at 759. And in *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), the Court relied on *Bolger* to invalidate a federal statute prohibiting indecent telephone communications, despite recognizing that, short of a ban, "the most enterprising and disobedient young people would manage to secure access to such messages." *Id.* at 130. *See also Playboy Entertainment Group*, 120 S. Ct. at 1886-87 ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be obtained by a less restrictive alternative.").

In rejecting Petitioners' claim that commercial speech restrictions cannot "deny communication to a large number of adults for the sake of protecting children," the court of appeals reasoned that this principle applies only to what it termed "expressive" speech, but not to "commercial" speech," Pet. App. at 34a. That analysis, however, squarely conflicts with the holdings of *Bolger* and *Carey* (which each involved commercial speech), and with the logic of the Court's recent indecency decisions (which each rely on *Bolger* for the proposition that government may not "reduce the adult population to only what is fit for children," 463 U.S. at 73). Neither was the court of appeals correct in claiming that this

principle did not apply here because the advertising restrictions were not "equivalent to a 'blanket ban' on speech." Pet. App. 35a. Under that reasoning, *Bolger* would apply to a complete ban on advertising a disfavored product, but the interest in protecting children would support an *almost*-complete ban on such advertising. A 90% restriction on advertising in the end warrants the same First Amendment scrutiny that a 100% restriction receives. The lower court's contrary analysis demands reversal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

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LORILLARD TOBACCO CO., ET AL.,

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., ET AL.

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the permissible locations for tobacco advertising, but do not affect the federally mandated health warning for cigarettes, are preempted by the Federal Cigarette Labeling and Advertising Act.

2. Whether, under the First Amendment, regulations that merely restrict the display of publicly visible tobacco advertising in locations near schools and playgrounds are properly analyzed under the intermediate scrutiny test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980), and, if so, whether the regulations satisfy that test.

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OTHER CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

In addition to the constitutional, statutory and regulatory provisions set forth in the Brief of Petitioners Lorillard Tobacco Co., *et al.* in No. 00-596 (hereafter "Pet. Br."), and in the appendix to the Petition for Writ of Certiorari in No. 00-596 (hereafter "Pet. App."), the following statutory provision is involved.

Section 2 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1331, provides:

> It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

INTRODUCTION

This case concerns the power of a State to take reasonable measures to limit advertising near schools and playgrounds promoting a harmful product that is illegal for sale to minors. None of the parties before the Court disputes that the vast majority of tobacco use begins with children, that children are exposed to the selling message of tobacco advertising each day, and that prevention of youth tobacco use is a paramount governmental concern. Indeed, none of the petitioners claims any right to advertise to children, nor could they. Thus, under the First Amendment, the petitioners raise the relatively narrow issue of whether Massachusetts has chosen appropriate means to protect an unintended audience from exposure to tobacco advertising, while still permitting adults ample access to tobacco product information through other channels. The limited nature of Massachusetts' restrictions — which prohibit only publicly visible tobacco advertising near schools and playgrounds — makes plain that the challenged regulations are appropriately tailored. For similar reasons, the regulations are clearly outside the scope of preemption under the Federal Cigarette Labeling and Advertising Act, wherein Congress precluded the States from regulating the health-related content of cigarette advertising, but indicated no intention to foreclose the States' historic power to limit the locations in which advertising may be displayed.

STATEMENT

1. Tobacco use, in particular cigarette smoking, is the leading preventable cause of disease and premature death in the United States. Joint Appendix (hereafter "JA") 188. Overwhelmingly, smoking and smokeless tobacco use begin, and become established, in adolescence. JA 177, 187, 194, 195, 210; State's Lodging (hereafter "Ldg.") 8. The average age at which smokers try their first cigarette is 14 ½

years. JA 210. Nationally, 82% of adult smokers started smoking before the age of 18, and approximately 70% of them had become regular smokers by that age. JA 210, 214. The Surgeon General has found that "[m]ost young people who smoke regularly are already addicted to nicotine, and they experience this addiction in a manner and severity similar to what adult smokers experience." JA 190. Thus, addiction to the nicotine in tobacco occurs almost exclusively during adolescence and young adulthood. JA 194, 195.

The consequences of youth tobacco use are severe. The younger a person begins to smoke, the more likely he or she is to become a heavy smoker. JA 189, 190, 214. An adolescent who continues smoking into adulthood substantially increases his or her risk of dying from cancer, heart disease or lung disease. JA 189-190, 214, 218. Continued use of smokeless tobacco is associated with a range of oral cancers. JA 190. Likewise, regular cigar smoking causes cancer of the lung, oral cavity, larynx and esophagus. JA 244. As this Court recently recognized, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

A person who does not begin smoking in childhood or adolescence is unlikely ever to begin. JA 214. Thus, the Surgeon General has stated that "young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases." JA 192. Yet "efforts to prevent the onset or continuance of tobacco use face the pervasive challenge of promotion activity by the tobacco industry." Ldg. 18. Cigarettes and smokeless tobacco are among the most

intensely advertised and widely promoted products in America. JA 215. In 1999, the cigarette companies spent $8.24 billion — more than in any prior year — on advertising and promotion in a variety of media, including magazines, newspapers, outdoor advertising, retail advertising and promotions, and direct mail campaigns. Ldg. 27. The three most heavily advertised cigarette brands — Marlboro, Newport and Camel — are purchased by 85% of adolescent smokers. JA 210. Adults, on the other hand, purchase a greater variety of brands (including discount and generic brands) that receive relatively little advertising exposure. JA 215; Ldg. 17.

2. It has been extensively documented by the Surgeon General and other leading health authorities that tobacco advertising promotes both the initiation of tobacco use by minors and reinforces that use in minors who use tobacco.[1] In his most recent report, the Surgeon General found that "[c]onsiderable evidence has accumulated showing that advertising and promotion are perhaps the main motivators for adopting and maintaining tobacco use." Ldg. 3. Interventions aimed at minors are essential, because "[c]hildren and teenagers constitute the majority of all new smokers, and the industry's advertising and promotion campaigns often have special appeal to these young people."

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[1] In support of his motion for summary judgment, the respondent submitted to the district court the findings of the Surgeon General, the Institute of Medicine of the National Academy of Sciences (IOM) and the Food and Drug Administration (FDA) concerning the effect of tobacco advertising on youth tobacco use, and the leading studies that address this issue. JA 101-128 (abstracting studies); 176-238 (excerpts from Surgeon General, IOM and FDA findings). *See* First Cir. JCA (hereafter "JCA") 1199-3087. Excerpts from the Surgeon General's 2000 report, and other evidence published since the case was submitted to the court of appeals, are included in the State's Lodging.

Ldg. 18. The Surgeon General has concluded that "[r]egulation of [the] advertising and promotion [of tobacco], particularly that directed at young people, is very likely to reduce both prevalence and uptake of smoking" and has recommended restrictions on tobacco advertising as part of a comprehensive program to address youth tobacco use. Ldg. 2, 11. The U.S. Centers for Disease Control and Prevention (CDC) and the Institute of Medicine of the National Academy of Sciences have made similar recommendations. JA 185, 212.[2]

A substantial body of evidence from diverse disciplines confirms that tobacco advertising reaches and influences young people. JA 101-128. Both medical and marketing researchers have found a significant correlation between the amount of cigarette advertising or promotion a young person is exposed to and positive attitudes toward smoking, smoking experimentation, and regular smoking. JA 108-120; JCA 1664-2012. Recently, longitudinal studies have demonstrated directly the relationship between advertising and progression to established smoking among adolescents. JA 109 (¶ 33), 120-121. Other studies have documented the dramatic effect of particular tobacco advertising campaigns in recruiting new young smokers and smokeless tobacco users. JA 107-108, 207-208, 221-222;

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[2] Similarly, after an exhaustive examination of the evidence, the Food and Drug Administration in 1995 issued a proposed rule that would have restricted tobacco advertising in various respects, including by prohibiting all outdoor advertising within 1,000 feet of any public playground or school. *See Brown & Williamson Tobacco Corp*, 529 U.S. at 128. Although the Court held that the FDA did not have statutory authority to regulate tobacco products as customarily marketed, *id.* at 160-161, it relied in various respects on the agency's findings in reaching that conclusion. *Id.* at 134-135. *See also* JA 213-238 (excerpts of proposed and final FDA rule and commentary).

Ldg. 5-6, 8.[3] Finally, studies have shown a decrease in smoking rates in countries that have banned or significantly restricted tobacco advertising, even when other factors, such as price, were controlled for. JA 208. *See* JA 122-123.[4]

The Surgeon General has concluded that tobacco advertising influences children and adolescents in at least two ways. First, tobacco advertising uses images — rather than information — "to portray the attractiveness and function of smoking." JA 197. The featured themes include adventure seeking, peer approval, sex appeal, success, sophistication and independence, all of which resonate especially with adolescents as they strive to define their identities during the transition to adulthood. JA 192, 197; *see* JA 211, 219. Because tobacco advertising portrays, in smokers, "attributes that children and adolescents would like to have," it implies that smoking may "close the gap" between an adolescent's actual self-image and the ideal for which he or she strives. JA 197, 206. Second, highly repetitious advertising exposure leads minors to overestimate the prevalence and "normalcy" of smoking among both peers

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[3] For example, in the late 1980's, the Camel brand's share of the youth market in California increased by 230% after R.J. Reynolds introduced an advertising campaign featuring the Joe Camel cartoon character; during the same period Camel's market share among adults remained essentially unchanged. JA 221-222. Similarly, in the early 1970's the prevalence of smoking by girls under age 18 jumped significantly following intensive advertising of Virginia Slims and other new "women's brands." JA 207-208, 222, 234.

[4] Moreover, it is undisputed that tobacco advertising reinforces *continued* tobacco use by minors who use tobacco products, many of whom are already experiencing nicotine addiction. JA 205-206, 223; Ldg. 9. The cigarette companies specifically allege that one purpose and effect of their advertising is to "reinforce the brand preferences of smokers." JA 14.

and adults. JA 197, 207. The degree of youth overestimation of smoking prevalence is, in turn, one of the strongest predictors of smoking initiation. JA 207; *see* JA 123-125, 220; Ldg. 6. These findings are echoed in a 1994 report of the Institute of Medicine. JA 182-184.

In Massachusetts, children are routinely exposed to a significant volume of tobacco advertising. Two Massachusetts studies have documented that the density of such advertising is particularly high in areas where young people spend time, such as near schools, constituting over one-half of the advertisements visible from outside retail establishments surveyed. JA 95, 105-106; *see* Ldg. 58. One of these studies found that 32% of outdoor cigarette advertisements, including those inside stores and visible from the outside, were at children's eye level (i.e. below 3.5 feet). JA 105; JCA 2384.

3. In 1993, Massachusetts established its statewide tobacco control program, funded by a 1992 increase in the cigarette tax. JA 90-91; Ldg. 13-15. The State's tobacco control efforts include extensive school-based tobacco prevention programs, intensive enforcement of youth access restrictions, a sustained counter-advertising campaign, local licensing requirements for tobacco retailers, and scores of community based anti-tobacco programs, which implement a wide range of youth education, access restriction and cessation programs. JA 90-96; Ldg. 13-15. Between 1994 and 1998 local boards of health conducted 31,603 controlled buying attempts by minors (i.e. "stings") against tobacco retailers, cutting in half the rate of violation of the state tobacco sales law. JA 93. Massachusetts also maintains one of the highest cigarette taxes in the country. JCA 671, 784. In 1999, Massachusetts was recognized by the CDC as maintaining one of the two leading tobacco programs in the Nation. JA 91, 97.

Despite these initiatives, youth tobacco use in Massachusetts remains unacceptably high. In 1999, the rate of recent smoking (*i.e.* past 30 days) among Massachusetts high school students was 30%, with 13% of high school students smoking every day. JA 285, 286, 292. Twenty-three per cent of Massachusetts students report smoking their first whole cigarette before age 13, a rate which has dropped only one percentage point since 1993. JA 285, 288. In 1999, 4.9% of Massachusetts high school students used smokeless tobacco and 15.6% used cigars. JA 288, 292. In 1996, the CDC estimated that, if current trends continue, 105,000 Massachusetts children alive today will die prematurely of cigarette smoking. Ldg. 71.

4. Pursuant to his authority under Mass. Gen. Laws c. 93A, § 2(c), on May 1, 1998, the Attorney General issued a notice of proposed regulations concerning the sale and marketing of tobacco products. Final regulations, as revised following rulemaking proceedings, were issued in January 1999. 940 Code Mass. Reg. 21.00, *et seq.* and 22.00, *et seq.*, Pet. App. 105a-126a. The purpose of the regulations is to "address the incidence of [tobacco] use by children under legal age . . . [and] to prevent access to such products by underage consumers." 940 C.M.R. §§ 21.01, 22.01(2), Pet. App. 105a, 115a. The regulations seek to: (1) reduce youth access to tobacco by prohibiting marketing practices that promote the illegal distribution of tobacco products to minors, *see* Mass. Gen. Laws c. 270, § 6, and (2) reduce youth demand for tobacco by restricting tobacco advertising in areas where children see it frequently.

Among other things, the regulations require retailers to verify the age of all tobacco purchasers appearing to be under 27 and prohibit retail practices known to facilitate minors' access to tobacco, such as the distribution of free samples, the sale of products through the mail without age verification, and the use of "self-service" tobacco product

displays. 940 C.M.R. §§ 21.04(1)-(4); 22.06(1)-(4), Pet. App. 108a-110a, 120a-123a.[5] The regulations also prohibit "[o]utdoor [tobacco] advertising, including advertising . . . from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." 940 C.M.R. §§ 21.04(5)(a), 22.06(5)(a), Pet. App. 111a, 123a. For retailers located in these areas, the regulations also prohibit interior tobacco advertising placed at children's eye level (*i.e.* lower than five feet from the floor). 940 C.M.R. §§ 21.04(5)(b), 22.06(5)(b), Pet. App. 111a, 123a.[6]

In enacting its regulations, Massachusetts joined a growing number of States and localities that have placed location-based restrictions on tobacco advertising. One state, Utah, has entirely prohibited outdoor tobacco advertising since 1929. Utah Code Ann. § 76-10-102 (1999). *See also, e.g.,* Pet. App. 131a, *citing* Texas Health and Safety Code § 161.122 (prohibiting, with certain exceptions, tobacco advertisements within 1,000 feet of a church or school).

Petitioners' repeated assertion that the Massachusetts regulations impose a "near-total ban" on tobacco advertising is a significant overstatement. Pet. Br. 25, 45. The

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[5] The regulations also allowed a retailer, at its discretion, to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here'" on the outside of, or visible from, the retail premises. 940 C.M.R. §§ 21.04(6), 22.06(6), Pet. App. 111a, 123a. The district court held this so called "tombstone" provision preempted and the Attorney General did not appeal that ruling. Pet. App. 6a.

[6] Retail outlets that do not admit minors are exempt from the regulations' marketing and interior advertising restrictions. Pet. App. 113a-114a, 125a-126a.

regulations place no restrictions on petitioners' advertising in areas outside the school and playground zones, nor do they affect advertising in magazines, newspapers, direct mail and other media. Moreover, on its face petitioners' survey did *not* "reveal[] that between 87 and 91 percent of the land area of [three Massachusetts cities] was covered" by the regulations. Pet. Br. 4. Instead, the survey discloses that these percentages of land area "would be unavailable" for outdoor tobacco advertising after aggregating the school/playground zones defined in the regulations and all *other* areas (such as residential zones, colleges, cemeteries, parks, playgrounds and schools) where advertising is restricted for other reasons. *See* JA 164-167. Petitioners' survey affidavit does not identify the substantially smaller percentage of land area that the 1,000 foot school and playground zones would occupy. *See, e.g.*, JA 166 (Worcester survey map).

5. On November 23, 1998, Massachusetts entered into a multi-state agreement, known as the Master Settlement Agreement (or "MSA"), which resolved certain of the States' litigation against the major cigarette companies. Under the MSA, the petitioner cigarette companies are prohibited from displaying any outdoor advertising (including on billboards) or transit advertising. JA 259, 263-264. The MSA excepts from these restrictions the display of exterior advertising, no larger than 14 square feet, at retail outlets selling cigarettes and places no restrictions on interior retail advertising. *Id.* Since the MSA was executed, cigarette manufacturers have taken full advantage of these exceptions, increasing their point-of-sale advertising by 13.3% from 1998 to 1999. Ldg. 28, 59, 61. In fact, total cigarette advertising expenditures increased by 22.3% in 1999, the year following the execution of the MSA, Ldg. 27, indicating that the companies are engaged in extensive promotional activity in areas that are unrestricted by the agreement. Ldg. 62.

Prior Proceedings and Decisions

On May 21, 1999, petitioner cigarette manufacturers filed this action in the United States District Court for the District of Massachusetts. JA 1. These companies claimed preemption under the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"), 15 U.S.C. § 1334(b), of both the regulations' restrictions on tobacco advertising and the regulations' bans on free product giveaways and the sale of tobacco products through the mail without age verification. Pet. App 48a-49a. Petitioners also claimed that the advertising restrictions and the prohibition of self-service tobacco displays violate the First Amendment. Pet. App. 63a. The petitioner smokeless tobacco and cigar companies later filed similar actions in the same court. JA 16, 61.

On December 2, 1999, the district court (Young, C.J.) granted summary judgment for the State on petitioners' preemption claim. Pet. App. 46a, 59a-60a. The district court identified the decisive issue as whether the challenged regulations constitute a requirement or prohibition "based on smoking and health," as that phrase is used in the FCLAA's preemption clause, Section 1334(b). Pet. App. 51a. The court found it significant that Congress expressly stated its purpose with respect to preemption — to prevent nonuniform cigarette labeling and advertising regulations "with respect to any *relationship between smoking and health*." Pet. App. 54a, *quoting* 15 U.S.C. § 1331 (emphasis in opinion). The court found that the Massachusetts advertising regulations "do not implicate the relationship between smoking and health. Rather, they 'simply restrict the location of cigarette-advertising signs, irrespective of the nature of the message communicated.'" Pet. App. 56a, *quoting Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore,* 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated and remanded,* 518 U.S. 1030, *modified by,*

101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204 (1997).

The district court also granted, in substantial part, the State's motion for summary judgment on petitioners' claims under the First Amendment. Pet. App. 104a. Applying the test for review of commercial speech regulations set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the court concluded that "the Attorney General has provided substantial evidence showing that regulation of tobacco advertising would substantially advance its interest in curtailing underage smoking." Pet. App. 75a. The district court found, with respect to the outdoor advertising regulation, that the defined school and playground zones were sufficiently narrowly tailored, but held that the Attorney General had not supported his view that minors would also more frequently enter retail stores within the 1,000 foot zones, and so held the indoor advertising provision invalid. Pet. App. 78a-83a.

The First Circuit affirmed the district court's decision with respect to preemption. Relying on recent decisions of the Second and Seventh Circuits, the court rejected petitioners' argument that the FCLAA preempts all state regulations "with respect to [tobacco] advertising." Pet. App. 9a-13a. Considering the FCLAA's preemption clause and its express statement of purpose, the court concluded "that Congress sought to inform the public of the health risks associated with smoking, and . . . to protect the national economy from the burdens that would result from a multitude of 'diverse, nonuniform, and confusing' advertising standards." Pet. App. 10a, *quoting Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 106 (2nd Cir. 1999), *cert. denied,* 529 U.S. 1066 (2000). The court found that Massachusetts' location-based restriction "do[es]

not touch upon Congress's 'comprehensive Federal program' to control cigarette advertising information." *Id.*

The First Circuit also upheld the advertising regulations under the First Amendment. Applying the *Central Hudson* test, the court found "that the Attorney General has offered sufficient product-specific evidence regarding cigarettes, smokeless tobacco, and cigars to demonstrate that the dangers posed by underage use of each is a 'real harm' and that the regulations can be reasonably expected to alleviate those harms to a material degree." Pet. App. 21a. The court concluded that the advertising restrictions would reduce the visibility of tobacco products to minors and eliminate "the psychological incentives to tobacco use presented by things as simple as attractive ad color and design," which the court agreed "may reasonably be assumed to have a greater effect on young people." Pet. App. 28a-29a. Under *Central Hudson*'s final prong, the court found the regulations sufficiently narrowly tailored because of their "obvious connection to the state's interest in protecting minors, which is served directly by limiting application of the regulations to areas near schools and playgrounds — areas where children are more likely to be." Pet. App. 30a. The First Circuit thus affirmed in part and reversed in part the district court's First Amendment ruling. Pet. App. 45a.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that a State law limiting the locations for display of tobacco advertising is not preempted by the Federal Cigarette Labeling and Advertising Act. Pub. L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340. The Act's purpose is clear: to mandate a uniform national health warning for cigarette packages and advertising while avoiding the burden to commerce from the imposition of conflicting health

warning requirements under state law. *See* 15 U.S.C. §§ 1331. Section 5(b) of the Act preempts only those state law requirements or prohibitions that are "based on smoking and health . . . with respect to the advertising or promotion of [properly labeled] cigarettes . . . ." Nothing in this text, or the Act's purpose or legislative history, suggests that Congress intended to intrude upon the traditional exercise of state and local zoning authority over commercial advertising. Rather, Congress created a program "to deal with cigarette labeling and advertising with respect to any *relationship* between smoking and health," 15 U.S.C. § 1331 (emphasis added), thus seeking to maintain exclusive federal control of the health-related *informational content* of cigarette packaging and advertising. Congress provided for preemption under § 5(b) to implement this statutory objective. This distinction is reflected in the result reached in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), where the plurality held preempted only those of the asserted claims that challenged the adequacy of the warning in the manufacturers' advertising. *Id.* at 524-531. Although the amendments to § 5(b) in 1969 expanded the *forms* of advertising content regulation that can be preempted, such as to include common law claims in addition to "positive enactments," *see id.* at 524, the 1969 amendments left in § 5(b) the critical "smoking and health" language limiting preemption to health-related advertising content. The Massachusetts regulations, which restrict only the location of cigarette advertising while leaving its content unaffected, are therefore not preempted.

2. Intermediate scrutiny is the appropriate standard for judicial review under the First Amendment of regulations that merely zone publicly visible tobacco advertising away from schools and playgrounds. In the regulations, Massachusetts has addressed the specific harms to children presented by tobacco advertising they unavoidably confront in the areas they spend time each day.

At the same time, petitioners remain free to communicate product and price information to adults through advertising in other locations, and in magazines, newspapers, by direct mail or other media. The regulations clearly do not "ban" commercial speech, but merely regulate its "place." Consequently, they should be reviewed consistently with various forms of "time, place and manner" restrictions on speech, for which intermediate scrutiny is well established.

That these locational restrictions are limited to the advertising of *tobacco,* but not other products, does not require heightened review. The State has drawn an entirely permissible distinction. The regulations are intended to further the State's law against tobacco sales to minors, and thus exhibit a close connection to a commercial transaction the State has prohibited. In addition, because tobacco advertising exerts an "undue influence" on children — who constitute the vast majority of new tobacco users — it can be singled out for regulation. Unlike the "blanket prohibition" on speech to *adults* that the Court unanimously stuck down in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Massachusetts regulations simply zone advertising away from the areas that children congregate.

3. The Massachusetts regulations satisfy each of the criteria for regulation of commercial speech under *Central Hudson*, 447 U.S. at 566. The governmental interests that support the regulations are compelling — the promotion of Massachusetts' policy against tobacco sales to minors and, ultimately, protection of the well-being of the State's children. Substantial evidence demonstrates the significant influence of tobacco advertising in promoting and maintaining tobacco use by minors. Thus, restricting tobacco advertising in areas where children attend school and play will directly and materially advance the State's interest.

Moreover, the regulations are narrowly tailored under the *Central Hudson* standard, even if they prevent some tobacco advertising from reaching adults. Petitioners remain free to advertise to adults in areas beyond the school and playground zones, and through other permitted channels. The petitioners themselves determined in 1990 to cease billboard advertising in areas within 500 feet of schools and playgrounds. The State's determination to set this distance at 1,000 feet (approximately three blocks) and to restrict certain interior retail tobacco advertising in these zones is entitled to deference. There is also no "obvious" alternative to a restriction of speech. Aggressive enforcement of the youth tobacco sales law, which Massachusetts has pursued, does not address the stimulation of youth *demand* for tobacco by petitioners' advertising. Especially given the magnitude of the problem Massachusetts seeks to address, its determination to restrict tobacco advertising near its communities' schools and playgrounds should be upheld.

ARGUMENT

I. REGULATIONS THAT RESTRICT THE LOCATION OF TOBACCO ADVERTISING ARE NOT PREEMPTED BY THE CIGARETTE LABELING AND ADVERTISING ACT.

The court of appeals correctly held that Massachusetts' regulations limiting the permissible locations for cigarette advertising are not preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA" or "Act"). Pub. L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340.[7] The Act's purpose, set forth in Section 2, is

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[7] Because the FCLAA regulates only cigarettes, 15 U.S.C. § 1332, petitioner United States Smokeless Tobacco Company and petitioners Altadis U.S.A., Inc., *et al.*, make no claim of federal preemption.

to provide a uniform warning to the public of the health effects of cigarette smoking and, at the same time, to avoid the burden to cigarette manufacturers that could result from state or local governments prescribing different "cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331. *See* 15 U.S.C. § 1333 (prohibiting the sale or advertisement of cigarettes without specific warning labels). *See Cipollone*, 505 U.S. at 514. To protect these interests, the Act's preemption provision, § 5(b), as amended in 1969, states:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. § 1334(b).

Although phrased with sufficient breadth to safeguard Congress's goal of a uniform national health warning, § 5(b) nowhere indicates that Congress intended to displace the historic police power of the States to restrict the location of commercial advertising. *See St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274-275 (1919). Petitioners' sweeping construction of § 5(b) would grant cigarette manufacturers the right to advertise in any location, in any community, regardless of whether that advertising would undermine any variety of legitimate local interests. Under such a regime, States and localities would be powerless to prohibit cigarette advertising in public buildings (even those where smoking is prohibited), on public transit systems, in areas adjoining school properties, in municipal sports stadiums, or even at the town little league

field.[8] Such an unusual invasion of local control by federal authority should not be inferred from the general language of § 5(b), which contains no indication of such intent. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (demanding "language much plainer than the text of [21 U.S.C.] § 360k" to find that Congress intended to grant immunity from design defect liability to the medical device industry).

Petitioners' argument that the Act broadly preempts state laws "with respect to . . . [cigarette] advertising" rests entirely on this discrete phrase in § 5(b), separated from "both textual and legislative context." *Cipollone*, 505 U.S. at 519, n.16. As explained below, petitioners' construction ignores other limiting language of § 5(b), is contrary to the structure and purpose of the Act, and cannot be reconciled with this Court's construction of the Act in *Cipollone*. Most significantly, petitioners' elliptical construction of the Act ignores the qualifying clause "based on smoking and health," which limits the scope of § 5(b) and demonstrates that locational restrictions, like Massachusetts', are not preempted.

1. In every preemption analysis, "[t]he purpose of Congress is the ultimate touchstone." *Medtronic,* 518 U.S. at 485, *citing Cipollone,* 505 U.S. at 516. To discern Congressional intent, the Court "examine[s] the explicit

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[8] Moreover, with respect to cigarette *promotion*, petitioners concede only that it is "questionable" whether the Act preempts the "direct and intentional solicitation" of unlawful sales to minors. Pet. Br. 24. Consistent with this view, in the district court petitioners challenged, as preempted, regulations that prohibit the distribution of free tobacco samples and the sale of tobacco products through the mail without verification of the recipient's age, 940 C.M.R. §§ 21.04(1)(a), (1)(c), (4)(a), marketing practices that are known to facilitate minors obtaining tobacco. *See* JA 28, 39, 216; Pet. App. 49a, 58a-59a.

statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). *See Medtronic,* 518 U.S. at 484-485. Although an express preemption clause indicates that at least some state law is preempted, the Court must nonetheless "identify the domain expressly pre-empted by [§ 5(b)]." *Cipollone*, 505 U.S. at 517. In discharging that task, *Cipollone* considered, in addition to the language of the preemption provision, the structure and purpose of the FCLAA as a whole and its legislative history. *Id.* at 519 (majority), 529 (plurality), 534, 539-41 (Blackmun, J., concurring in part and dissenting in part).

The Court's analysis in this case is also informed by "the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (majority), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The court of appeals correctly observed that both "zoning regulations and regulations directed at the safety and welfare of minors . . . 'lie peculiarly within the states' historic police powers.'" Pet. App. 11a (citations and quotations omitted). *See Packer Corp. v. Utah*, 285 U.S. 105, 111 (1932) (restrictions on tobacco advertising). As it did in *Cipollone*, the Court should construe § 5(b) narrowly in this case to avoid an unwarranted intrusion on the State's sovereign authority. *See Cipollone*, 505 U.S. at 518 (majority); *see also id.* at 524 (plurality) (construction of § 5(b) must be "fair but narrow"); 532 (Blackmun, J., concurring in part and dissenting in part) (Court cannot find preemption "in the absence of clear and unambiguous evidence that Congress intended that result"). *See also California Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316, 331-332 (1997).

2. Petitioners ignore the plain language of § 5(b) when they assert it preempts virtually any state law "with

respect to" the advertising of cigarettes. *See* Pet. Br. 14. Section 5(b) does not prevent the States from enacting laws specifically directed to cigarette advertising; by its terms, it targets for preemption only a subset of cigarette-specific advertising regulations — those "based on smoking and health." 15 U.S.C. § 1334(b).[9] *See Medtronic,* 518 U.S. at 488 (discussing FCLAA preemption provision). Although it is their burden to do so, petitioners make no attempt to demonstrate to this Court that the regulations meet this requirement. Pet. Br. 13-24.

The Massachusetts regulations are not "based on smoking and health," as that phrase is used in § 5(b). Instead, the regulations rest upon a fundamental judgment by the State about the appropriate, and inappropriate, locations for tobacco advertising in view of its influence on children. This judgment is based upon various substantial interests — consumer protection, the protection of children, support for parents, and support for the state policy against tobacco sales to minors. The regulations thus reflect the general interests often furthered in zoning laws. *See Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J.) ("Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually — or more often unilaterally — destructive."). These general interests do not bring the regulations within the phrase "based on smoking and health" as used in this labeling law, which language the Court has determined it must "fairly, but — in light of the strong

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[9] The Senate Report accompanying the 1969 amendments to the Act emphasized this focus. "The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health." Senate Rep. No. 91-566, at 12 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

presumption against pre-emption — narrowly construe . . . ." *Cipollone*, 505 U.S. at 523.

In the lower courts, however, petitioners urged that "the [preemption] clause outlaws *any* state law enacted due to 'health concerns about smoking.'" Pet. App. 53a. *See also* Cert. Pet. 16, n.8 (asserting that "facially tobacco-specific" regulations are inevitably "based on smoking and health"). This broad construction ultimately reads "based on smoking and health" out of § 5(b). As a practical matter, the enactment of almost any *cigarette-specific* marketing regulation could be motivated to some degree by "health concerns about smoking" because the grave health consequences of cigarettes are what distinguish them from virtually all other consumer products.[10] Generally applicable laws would adequately address non-health related issues that arise with respect to the marketing of cigarettes. Thus, petitioners' construction of "based on smoking and health" denies any limiting effect to these words, improperly treating them as mere surplusage. *See Cipollone,* 505 U.S. at 524 (plurality) ("each phrase within [§ 5(b)] limits the universe of [what is] pre-empted by the statute"). *See also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (rejecting construction of ERISA preemption provision that would "read Congress's words of limitation as mere sham").

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[10] For example, petitioners correctly point out that the Massachusetts Attorney General — like most public officials — had health concerns about tobacco use by young people and anticipated that reducing illegal sales of tobacco products to minors would promote the public health. Pet. Br. 3. These expressions of concern do not control whether the regulations are preempted. That question must ultimately turn on whether, by their *effects*, the regulations are within the scope of preemption Congress intended in the Act. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 105 (1992).

3. The text of § 5(b) "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, *quoting Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Considering "the provisions of the whole law, and . . . its object and policy," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations and quotations omitted), it is clear that Congress did not intend to preempt State laws that regulate only the location of tobacco advertising. *See Cipollone,* 505 U.S. at 529 (plurality) (considering purpose of FCLAA in construing "smoking and health" clause).

In § 2 of the Act, Congress stated its purpose to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any *relationship* between smoking and health . . . ." 15 U.S.C. § 1331 (emphasis added). By confining its regulatory program to the "relationship" between smoking and health in cigarette advertising and labeling, Congress identified as its chief concern the *informational content* of advertising and labeling. That focus is more specifically reflected in the remainder of § 2. There Congress expressed its purpose to inform the public about "any adverse health effects" of cigarette smoking through inclusion of warning notices on packages and in advertising, and to ensure that "commerce and the national economy" not be "impeded" by diverse labeling and advertising regulations "with respect to any relationship between smoking and health." *Id.* The statement of purpose thus strongly suggests that Congress sought only to preempt state laws that implicate the "relationship between smoking and health" by interfering with the Act's uniform health warning. 15 U.S.C. § 1331. Section 5(b) thus preempts state advertising regulations that require, or prohibit, smoking-and-health information on cigarette packages or with respect to cigarette advertising. *See, e.g., Vango Media, Inc. v. City of New York*, 34 F.3d 68,

74-75 (2nd Cir. 1994) (holding preempted city ordinance that required one public health message to be displayed for every four tobacco advertisements displayed on city-licensed property). The Act does not, however, preempt state laws that restrict only the locations where cigarette advertising can be displayed.

Moreover, zoning-type regulations do not impede "commerce and the national economy." 15 U.S.C. § 1331. Cigarette advertisers need not modify advertising intended for national or regional distribution to meet Massachusetts' requirements.[11] Compliance with the regulations is achieved simply by removal of advertising in the defined locations near schools and playgrounds. *See Packer Corp.*, 285 U.S. at 111-112 (describing Utah's ban on advertising tobacco products in outdoor locations as "wholly intrastate" and "essentially local").[12]

It would be illogical to conclude that Congress enacted the FCLAA to protect cigarette advertisers from the "burden" of varying state or local laws regulating the placement of outdoor advertising. Pet. Br. 21-22. Even

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[11] In contrast, California's proposal in 1969 to ban all print advertising of cigarettes, *see Cipollone*, 505 U.S. at 515, n.11, would have frustrated this purpose by requiring the many magazines that are distributed nationally or regionally to produce special editions for California.

[12] The Senate Report on the 1969 amendments to the Act stressed that the preemption provision was included to "avoid the chaos created by a multiplicity of *conflicting* [State or local] regulations . . . ." Senate Rep. No. 91-566, at 12 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2663 (emphasis added). The Massachusetts regulations do not conflict with any provision of the FCLAA. Nor do the regulations, which operate exclusively within Massachusetts, "conflict" with locational restrictions in other States.

under petitioners' construction, the Act does not achieve that purpose. As petitioners concede, cigarette advertisers are required to obey *generally applicable* state or local laws on the location of sign advertising, Pet. Br. 23, which vary from State to State, and city to city. *See, e.g.*, Mass. Gen. Laws. c. 93, § 29 (empowering state board to regulate billboards, signs and other advertising devices, and authorizing cities and towns to further regulate and restrict the same) (enacted in 1920). With or without the Massachusetts regulations, "a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances." *Greater N.Y. Metro. Food Council*, 195 F.3d at 109.

4. The plurality holding in *Cipollone* strongly suggests that preemption under the Act is limited to regulation that interferes with the federally mandated health warning in cigarette advertising. There the Court considered whether § 5(b) preempted common law claims asserted by Rose Cipollone's estate against several cigarette manufacturers as a result of her death from lung cancer. 505 U.S. at 508. Although all of the estate's claims generally concerned "smoking and health," the plurality embraced a narrow construction of § 5(b) and held preempted only: (i) a claim alleging that the manufacturers' advertising lacked an adequate warning about smoking and health, and (ii) a claim alleging misrepresentations in advertising that "neutralized" the federal warning. *Id.* at 524, 527-528. Claims of breach of express warranty and an alternative theory of fraudulent misrepresentation were held *not* preempted, even though directed squarely at the manufacturers' advertising. *See id.* at 525 (evidence of an express warranty consisted "largely of statements made in respondents' advertising"); *id.* at 529 (fraudulent misrepresentation claim was "based on allegedly fraudulent statements made in respondents' advertisements"). If FCLAA preemption were as expansive as petitioners say, the Court "could not have allowed the

continued prosecution of [these common law claims] — all of which relate generally to the effects on health of promoting the sale of cigarettes." *Penn Advertising*, 63 F.3d at 1324, *citing Cipollone*, 505 U.S. at 523-31.

Cipollone also emphasized that Congress preserved substantial authority in the States with respect to cigarette advertising. Specifically, Congress did not intend in the FCLAA to "proscribe the regulation of deceptive advertising" by either federal or state authority. *See* 505 U.S. at 529 (plurality). This, the plurality explained, was a further reason to define narrowly the categories of advertising regulation that are "based on smoking and health." The plurality stated that laws based on a "general duty" — such as the duty not to deceive — are not "based on smoking and health" within the meaning of § 5(b). *Id.* at 528-529 (holding fraud claim not preempted). Similarly, the locational restrictions in the Massachusetts regulations, which are based on the general proscription on unfair practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws. c. 93A, § 2(a), are not "based on smoking and health" as that phrase in § 5(b) was construed in *Cipollone*.

5. Nothing in the 1969 amendments to § 5(b) suggests that Congress intended to disrupt the traditional authority of state and local governments to regulate the location of commercial advertising. These amendments strengthened the warning message, prohibited cigarette advertising on radio and television, and gave the Federal Trade Commission authority, previously denied, to require warning labels in cigarette advertising. *See Cipollone*, 505 U.S. at 514-515. (The 1965 Act required warnings only on packaging, and prohibited any governmental authority from mandating warnings in advertising. *Id.*) *See also Brown & Williamson Tobacco Corp.*, 529 U.S. at 148-150.

The focus of Congress in 1969 was on preempting state law that would be inconsistent with the new federal policy of giving the FTC authority to impose warning requirements on cigarette advertisements. Thus, the "narrowing of the pre-emption provision to prohibit only restrictions 'imposed under State law' cleared the way for the FTC to extend the warning-label requirement to print advertisements for cigarettes." *Cipollone*, 505 U.S. at 515. Significantly, Congress retained in § 5(b) the important "smoking and health" limitation it had originally included in the clause. *Id.* at 529 (plurality) (noting that the phrase "relating to smoking and health" in the 1965 Act "was essentially unchanged by the 1969 Act"); *see also id.* at 539 (Blackmun, J., concurring in part and dissenting in part). Thus, the objective in 1969 remained as it was in 1965 — to bar conflicting requirements with respect to the health message on packages or, now, "with respect to" advertising. *Cf. id.* at 519-20 (1965 Act "pre-empted state and federal rulemaking bodies from mandating particular cautionary statements").[13]

Moreover, the legislative history of the 1969 amendments to the FCLAA "plainly expresses an intent to preserve the 'police regulations' of the States." *Cipollone*, 505 U.S. at 530, n.27 (plurality). The Senate Report "emphasized that the 'preemption of regulation or prohibition with respect to cigarette advertising *is narrowly*

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[13] Although the 1969 amendments to § 5(b) did not expand the *substantive* scope of preemption, they clearly enlarged the *forms* of state law health message regulation that are preempted. For example, because § 5(b), as amended in 1969, preempts "requirements or prohibitions . . . imposed under State law," rather than (as under the 1965 Act) simply "statements," *Cipollone* held that the provision can preempt common law claims, and not merely "positive enactments" of the States, as was the case under the 1965 Act. 505 U.S. at 521-522 (plurality), 548-549 (Scalia, J., concurring in part and dissenting in part).

phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*." *Id.* at 529, n.26 (plurality) (*quoting* Senate Report No. 91-566, p. 12)(emphasis in opinion). Massachusetts' tobacco advertising restrictions, enacted to further its law against "the sale of cigarettes to minors," are exactly the type of "similar" police regulation that Congress intended in the Act to preserve.

Congress did not, either in 1969 or at any other time, exhibit an intent to preempt state regulation of the location of cigarette advertising. Indeed, Utah had enacted a law in the 1920's that prohibited all outdoor tobacco advertising, which remains in effect today. *See* Utah Code Ann. § 76-10-102. The existence of the Utah law almost certainly would have surfaced in Congressional discussions of the 1969 amendments if there had been any understanding that the new federal legislation would suddenly negate this law. But research revealed no mention of this law in any of the Congressional deliberations relating to the adoption of the 1969 Act. In fact, Senator Moss of Utah, a strong proponent of tobacco control, made a separate statement criticizing certain of the 1969 amendments, but never mentioned preemption of his State's law. *See* 1970 U.S.C.C.A.N. 2668-2674. Consequently, the most appropriate inference, and one that is consistent with the overall structure and purpose of the 1969 Act, is that Congress harbored no such intent. *See Medtronic,* 518 U.S. at 491 (absence of any reference in Congressional hearings, Committee reports or debates to preemption of state common law remedies confirmed conclusion that no preemption intended).

II. THE MASSACHUSETTS REGULATIONS ARE FULLY CONSISTENT WITH THE FIRST AMENDMENT.

Some seventy years ago, this Court sustained against a federal constitutional challenge the Utah law that prohibits all outdoor tobacco advertising, while simultaneously permitting tobacco advertisements in newspapers, magazines and other publications. *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Although that case involved an equal protection rather than First Amendment challenge, what the Court said has direct bearing on the First Amendment claim made in this case:

> "The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." . . . *The Legislature may recognize degrees of evil and adapt its legislation accordingly.*

Id. at 110 (quoting state court) (emphasis added). This same distinction is what justifies *for First Amendment purposes* Massachusetts' decision to restrict publicly visible tobacco advertising in areas near schools and playgrounds, while leaving unrestricted such advertising in other locations, and in magazines, newspapers and other media. Indeed, given the Court's common-sense observation that it is easier to avoid a radio broadcast than a billboard advertisement, if the First Amendment permits Congress to ban tobacco advertising from radio and television, *see* 15 U.S.C. §§ 1335, 4402(f), it necessarily follows that the First Amendment

permits the States to prohibit publicly displayed tobacco advertising near schools and playgrounds.

A. Regulations that Restrict the Location of Publicly Visible Tobacco Advertising to Protect Children from its Influence are Properly Analyzed Under Intermediate Scrutiny.

Unable to persuade the lower courts that the regulations fail to satisfy intermediate scrutiny under the *Central Hudson* test, 447 U.S. at 566, petitioners ask this Court to review Massachusetts' regulation of commercial speech under the strict scrutiny standard applicable to political and other "core" speech. Petitioners propose a significant departure from the Court's jurisprudence. The Court has often explained that commercial speech enjoys "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (citations and quotations omitted). Despite the substantial value to legitimate purchasers of the free flow of accurate commercial information, *44 Liquormart*, 517 U.S. at 496-497, the government may have sound reasons to restrict commercial advertising or solicitations to prevent harm to consumers or vulnerable members of the public. *See Florida Bar,* 515 U.S. at 625; *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 462 (1978). In view of these competing interests, *see Florida Bar*, 515 U.S. at 623, the Court has reviewed commercial speech regulations under the intermediate scrutiny framework set forth in *Central Hudson. See, e.g., Greater New Orleans Broadcasting Ass'n., Inc. v. United States,* 527 U.S. 173, 183-196 (1999). Petitioners present no reason to depart from this precedent with respect to

Massachusetts' location-based limitation of tobacco advertising.

1. Zoning restrictions on the public display of commercial speech present different considerations than the complete suppression of commercial speech, and merit no more than intermediate scrutiny. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the plurality specifically applied the *Central Hudson* test to a city's prohibition on outdoor billboard-type commercial advertising. *Id.* at 507-512.[14] Because Massachusetts has chosen to regulate only publicly visible advertising — thus permitting the continued dissemination of product information through other media — its interests necessarily are focused on the distinct harms associated with such public displays. *Cf. City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (describing the "visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property"). The State, quite clearly, is not trying to suppress altogether the communication of product information to interested consumers. *Cf. 44 Liquormart*, 517 U.S. at 504 ("[T]here is no question that Rhode Island's price advertising ban constitutes a blanket prohibition" of speech.). This careful tailoring respects the communicative interests involved in commercial speech, even as Massachusetts strives to minimize the serious harms associated with the display of tobacco advertising in areas where children spend a large proportion of their time. "As with other varieties of speech, it follows as well that there

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[14] Indeed, in *Metromedia*, the judgment of this Court — endorsed by the reasoning of seven Justices in that case — was that a city could choose to eliminate commercial billboard advertising entirely from within its jurisdiction to advance aesthetic and traffic safety interests. *See* 453 U.S. at 512 (plurality); *id.* at 550-553 (Stevens, J., dissenting in part); *id.* at 559 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

may be reasonable restrictions on the time, place, and manner of advertising." *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). Even if the complete suppression of all advertising for a lawful product would be presumptively invalid under the First Amendment, zoning-type restrictions on publicly visible advertising should be evaluated according to the intermediate level of scrutiny traditionally associated with various forms of "time, place, and manner" regulations. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (analyzing zoning law as "time, place, and manner regulation").

2. The intermediate scrutiny of *Central Hudson* is also appropriate because Massachusetts' locational restriction limits advertising that presents particular harms to children. Although a law focused on the advertising of a specific product — here, tobacco — can be characterized as "content-based," the Massachusetts regulations draw an entirely permissible distinction. Commercial speech is entitled to "lesser protection" precisely where it is "aimed at . . . the particular adverse effects stemming from [the] content [of that speech]." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.11 (1993).[15] As petitioners note, in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992),

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[15] In *Discovery Network*, 507 U.S. 410, the Court, applying *Central Hudson*, invalidated a city ordinance that prohibited newsracks for commercial publications, but permitted newsracks for publications with noncommercial content, because the ordinance's discriminatory treatment of commercial speech was entirely unrelated to the city's esthetic and safety interests. *Id.* at 424-428. Because the ordinance was "content based," the Court rejected the city's separate argument that it could be justified as a "time, place, and manner" restriction. *Id.* at 429. The Massachusetts regulations, on the other hand, make both an appropriate content distinction and restrict only the "place" of advertising. Thus, the regulations clearly require no more than intermediate scrutiny.

the Court included commercial speech among those categories of "proscribable" speech that may be regulated with reference to its content. *Id.* at 388-389; *see id. at* 422 (Stevens, J., concurring) ("It is . . . beyond question that the Government may choose to limit advertisements for cigarettes, *see* 15 U.S.C. §§ 1331-1340, but not for cigars . . . ."). *R.A.V.* cited the risk of fraud as "one of the characteristics" of commercial speech "depriving it of full First Amendment protection" and justifying its content-based regulation. 505 U.S. at 388-89. If the government can impose content-based restrictions on commercial speech to deter fraud, it follows with even more force that it may restrict the influence of tobacco advertising in promoting a product that is addictive, dangerous and illegal for sale to minors.

Massachusetts is restricting advertising that exerts an undue influence on a vulnerable class — children and adolescents — with potentially grave consequences. *See 44 Liquormart*, 517 U.S. at 498 (plurality) ("[T]he State . . . may restrict some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers."); *Ohralik*, 436 U.S. at 464-465 (State addressed a "well founded" perception of harm where person solicited was "vulnerable to influence"). By heavily promoting their products near schools and playgrounds, petitioners "exploit consumers, children, who are unable to protect themselves." *Federal Trade Comm'n v. Keppel & Bro.*, 291 U.S. 304, 313 (1934).[16] Nearly all first use of tobacco occurs before high

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[16] In *Keppel & Bro.*, the Court affirmed an order of the Federal Trade Commission preventing the sale of candy in "break and take" assortments, where the price or amount of the candy received was affected by chance. Although the Court assumed the practice "[did] not involve any fraud or deception," it nonetheless held it to be an unfair method of competition because it induced children "too young to be capable of exercising an intelligent judgment" to purchase an undesirable article. *Id.* at 309, 314.

school graduation and, as a result, "young people are the chief source of new consumers for the tobacco industry...." JA 187, 192. Nonetheless, petitioners' advertising — rich in images with youthful appeal — is highly visible in locations where children walk, gather and play, such as near schools and playgrounds. JA 95, 105-106, 183, 236; Ldg. 58. Through its youthful imagery and by its sheer ubiquity, tobacco advertising conveys to those "too young to be capable of exercising an intelligent judgment," *Keppel & Bro.*, 291 U.S. at 309, that tobacco use is desirable and pervasive. JA 182, 207. Petitioners' advertising clearly engenders "the potential for deception or confusion" that allows for regulation of commercial speech based on its content. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983).

Moreover, in restricting publicly visible tobacco advertising near schools and playgrounds, Massachusetts seeks to promote the efficacy of its law prohibiting the sale or distribution of tobacco to minors. Mass. Gen. Laws c. 270, § 6. By restricting tobacco *advertising* in aid of a statutory prohibition on tobacco *sales*, Massachusetts makes the most appropriate "content" distinction it could make in limiting commercial speech. *See Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[T]he State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.").

For the same reason, petitioners are wrong to contend that the regulations amount to impermissible viewpoint discrimination. Pet. Br. 39. Massachusetts has a neutral basis for its regulation (support of its tobacco sales law), which forecloses any argument that "official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. In addition, by targeting advertising because of its influence on children, the State seeks to address a harm, not "silence" a viewpoint. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518

U.S. 727, 771 (1996) (Stevens, J., concurring) (finding provision permitting operator to prohibit indecent programming on cable channels viewpoint neutral). By limiting the regulations to "promotional" speech, *see* 940 C.M.R. § 21.03 (defining "advertising"), Massachusetts has merely ensured that the regulations will not restrict fully protected noncommercial speech. Because petitioners retain "the full panoply of protections available [for their] direct comments on public issues . . . there is no reason for providing similar constitutional protections when such comments are made in the context of commercial transactions." *Bolger,* 463 U.S. at 68; *Central Hudson*, 447 U.S. at 563 n.5.

3. The Massachusetts regulations implicate none of the concerns that prompted criticism of intermediate scrutiny as the appropriate standard of review in *44 Liquormart*, 517 U.S. 484. There, the plurality questioned the applicability of intermediate scrutiny where the government seeks to deprive *adults* of accurate information about their chosen products through a "blanket prohibition" on speech, in circumstances where the absence of direct regulation suggests the government may be regulating speech "to pursue a nonspeech related policy." *Id.* at 496-504 (plurality); *see id.* at 518 (Thomas, J., concurring). *See also, e.g., Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 770-773 (1976) (criticizing the State's "highly paternalistic approach" in prohibiting advertising of prescription drug prices). But Massachusetts has a different objective — to avoid exposing an *unintended* audience to tobacco advertising and its collateral harms, without altering the communicative message of petitioners' advertising to its intended, adult audience. Indeed, petitioners allege it is their intention to advertise only to adults, and then only to those adults who have already made the decision to use tobacco ("adult smokers"). JA 19, 30, 68. To actually achieve this

objective, however, the public display of tobacco advertising in areas frequented by children must be restricted. There is no need for heightened review where, in the interest of protecting children and supporting its laws prohibiting tobacco sales to minors, a State imposes a zoning-type restriction on publicly visible advertising that leaves ample alternative means of advertising to adults.

B. The Regulations Satisfy Intermediate Scrutiny under the *Central Hudson* Test.

Under the *Central Hudson* test, the Court first inquires whether the commercial speech at issue concerns a lawful activity and is not misleading; if not, it is without First Amendment protection. *Central Hudson*, 447 U.S. at 566.[17] The remainder of the test holds that the government

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[17] The State does not concede that petitioners' advertising "concerns lawful activity and is not misleading." These issues were neither adjudicated nor stipulated below. *See* Pet. App. 17a, 68a. Petitioners repeated characterizations to the contrary are incorrect. Pet. Br. 8, 12, 35. Indeed, the regulations declare petitioners' advertising practices to be "unfair or deceptive" under Mass. Gen. Laws. c. 93A, § 2(a). *See* 940 C.M.R. §§ 21.02, 22.02, Pet. App. 105a, 115a. It was, however, unnecessary for the district court to adjudicate these issues in connection with the State's motion for summary judgment. Because the advertising regulations are clearly permissible when analyzed against the balance of the *Central Hudson* factors, the Attorney General asserted that they may stand even if, *arguendo*, the petitioners' advertising concerned lawful activity and were not misleading. Had the district court not granted summary judgment to the State, it was open to the Attorney General to submit proof at trial that the petitioners' advertising concerns unlawful activity or is misleading. *See* JCA 1394-1395, 1518-1519, 1527-1528 (FDA explaining that petitioners' advertising practices induce minors to use tobacco products, which they cannot legally purchase). *See, e.g., Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 78-83, *cert. denied*, 513 U.S. 1016 (1994).

may regulate even non-misleading commercial speech concerning a lawful activity where (ii) it asserts a substantial interest in regulating the speech, (iii) the regulation directly advances the governmental interest asserted, and (iv) the regulation is not more extensive than necessary to serve that interest. *Id.* at 566. As explained below, the court of appeals correctly held that the Massachusetts regulations meet each requirement under the *Central Hudson* framework. Pet. App. 14a.

1. Massachusetts has a compelling interest in protecting children by reducing their exposure to tobacco advertising.

By its regulations Massachusetts seeks to limit the daily exposure of children and adolescents to the powerful appeal of tobacco advertising. The protection of children is a compelling State interest. *See Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("basic in a democracy, stand the interests of society to protect the welfare of children"). In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court held that the State's interest in the "well-being of its children" justified restrictions on the dissemination of otherwise protected expression where "minors' exposure to such material might be harmful." *Id.* at 639. Since *Ginsberg*, the Court has "repeatedly recognized the governmental interest in protecting children from harmful materials." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997). *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (government has a "compelling interest in protecting the physical and psychological well-being of minors"). Because Massachusetts has "acted to restrict a mode of communication that . . . reaches a group the [State] has a right to protect[,]" *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 94 (1977), its regulations are entitled to a significant measure of deference. *See Capital*

Broadcasting Company v. Mitchell, 333 F. Supp. 582, 585-586 (1971) (upholding prohibition of cigarette advertising on television and radio), *summarily aff'd*, 405 U.S. 1000 (1972).

Two related and substantial interests are also served by the regulations. The regulations support both Massachusetts and federal policies against selling or giving tobacco to minors. *See* Mass. Gen. Laws c. 270, § 6; 42 U.S.C. § 300x-26(b) (providing federal funding for state efforts to "reduc[e] the availability of tobacco products to individuals under the age of 18"). The regulations also support parents' rights to raise their children free from inducements to use tobacco. "Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.'" *Bellotti v. Baird*, 443 U.S. 622, 639 (1979), *quoting Ginsberg*, 390 U.S. at 639. Parents who limit their children's exposure to tobacco advertising in magazines, newspapers, the Internet, or direct mail,[18] are powerless to shield a child from advertising posted near schools and playgrounds. Support for parental authority is a substantial interest that can justify laws that restrict the exposure of children to speech intended for adults. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978).

2. Restricting the daily exposure of children to tobacco advertising will materially advance the State's interests.

The third prong of the *Central Hudson* test asks whether the challenged regulation of commercial speech

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[18] *See Bolger*, 463 U.S. at 73 (noting that parents can "exercise substantial control over the disposition of mail once it enters their mailboxes").

"directly advances the governmental interest asserted." 447 U.S. at 566. The government must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Although the government must offer more than "mere speculation or conjecture," *id.* at 770, its third prong burden may be met by the submission of studies, surveys and even anecdotal evidence indicating that the regulation will advance the articulated governmental interest. *Florida Bar*, 515 U.S. at 626. In appropriate cases, commercial speech restrictions may be justified by reference to "history, consensus and 'simple common sense.'" *Id.* at 628, *quoting Burson v. Freeman*, 504 U.S. 191, 211 (1992). *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) (government's third prong burden met because "Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling").

At the outset, it is apparent that the regulations will advance the State's interest in promoting compliance with its law prohibiting distribution of tobacco to minors. The Utah Supreme Court recognized long ago that "[t]he prohibiting of billboard and other placard advertising has a direct bearing and relation to the object of [state law] in attempting to prevent the sale to and use of cigarettes and tobacco by minors." *State v. Packer Corp.*, 297 P. 1013, 1018 (Utah 1931). In addition, it is self-evident that the regulations will advance the State's interest in supporting parents' efforts to minimize their children's exposure to tobacco advertising. Petitioners do not challenge the regulations' advancement of these two interests. Pet. Br. 42-44.

In addition, the State's extensive evidentiary submission amply demonstrates that the regulations will directly advance its interest in addressing the incidence of underage tobacco use. 940 C.M.R. §§ 21.01, 22.01, Pet.

App. 105a, 115a. As discussed *supra* at 4-7, a broad range of evidence that has accumulated over the past two decades converges on the conclusion that tobacco advertising promotes both the initiation of tobacco use by minors and reinforces that use in minors who smoke. Ldg. 3.[19] The Surgeon General comprehensively reviewed this evidence in 1994, JA 187-209, and updated his review in 2000, concluding that "[r]egulation of advertising and promotion [of tobacco], particularly that directed at young people, is very likely to reduce both prevalence and uptake of smoking." Ldg. 2. These findings, published pursuant to a delegation from Congress to report periodically on tobacco and health, warrant substantial deference. *See* 15 U.S.C. §§ 1337, 1341(c).

The "quantum of empirical evidence" needed to satisfy judicial scrutiny under the First Amendment "will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't. PAC*, 528 U.S. 377, 391 (2000). The notion that advertising

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[19] In addition, there is powerful historical evidence of the capacity of advertising and promotion to stimulate youth demand for smokeless tobacco and cigars. In the late 1960's, petitioner U.S. Tobacco Company successfully revived a declining market for smokeless tobacco products by targeting young males in its promotion and advertising. Intensive marketing of smokeless tobacco featured a "graduation" strategy whereby low-nicotine "starter" brands were featured in advertising. Over the course of fifteen years, the rate of smokeless tobacco use by young males increased tenfold. JA 219; Ldg. 5-6; JCA 1395. *See* Pet. App. 23a. The National Cancer Institute reports that recent data on cigar use among adolescents is "alarming," and that cigars are being "heavily promoted in ways likely to influence adolescent use." JA 239, 240, 243. Although the use of sex and celebrity to sell cigarettes has been forbidden by the cigarette industry's voluntary code since 1965, these appeals are a regular feature of cigar marketing. JA 243. *See* Pet. App. 24a-25a.

promoting the pleasures and rewards of tobacco use can influence children to make inappropriate choices is neither novel nor implausible. *See, e.g., Bellotti*, 443 U.S. at 635 (observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"). The evidence of the effect of tobacco advertising on young people thus confirms what human experience would suggest.[20] In any event, the extensive submission that accompanied the State's motion for summary judgment far exceeds what the Court has deemed necessary in reviewing commercial speech restrictions similar in purpose or effect to the Massachusetts regulations. *See Metromedia,* 453 U.S. at 509 (city's finding that billboards threaten traffic safety justified by the "accumulated, commonsense judgments" of lawmakers and courts); *Ohralik*, 436 U.S. at 464 (rule intended to prevent overreaching and undue influence justified where State's "perception of the potential for harm in [the] circumstances . . . [was] well founded"). *See also Florida Bar*, 515 U.S. at 626-629.[21]

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[20] For similar reasons, the Court did not demand "scientifically certain criteria of legislation" in *Ginsberg v. New York;* it was enough for the New York legislature rationally to conclude that the sale to children of sexually explicit magazines presented a danger against which they should be guarded. 390 U.S. at 641-43.

[21] The smokeless tobacco and cigar petitioners argue that they should be exempt from Massachusetts' regulation of tobacco advertising. United States Tobacco Br. 16; Altadis U.S.A. Inc. Brief 5. It would, however, be irrationally inconsistent for Massachusetts to restrict cigarette advertising, but not the advertising for other hazardous tobacco products that are also illegal for sale to minors. This is precisely the type of inconsistency that the Court has found unacceptable in commercial speech regulation. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (prohibition on displaying alcohol content on

Petitioners' suggestion that the State has no interest in protecting children from "truthful" tobacco advertising is misplaced. Pet. Br. 12, 35. The Surgeon General found that the sheer volume and repetition of tobacco advertising leads young people to overestimate the prevalence and "normalcy" of smoking among both peers and adults, and to smoke themselves. JA 197, 207. The Institute of Medicine similarly concluded: "The impression that tobacco use is desirable and normative is conveyed through image advertising and promotions that make tobacco products highly visible in public spaces — if not by their presence, then by proxy in the forms of brand trademarks, insignia, logos and [other] items . . . ." JA 178-179. Cigarette advertisers themselves have said they attempt to achieve a "friendly familiarity" for tobacco products through extensive advertising in diverse media. JCA 1393; *see* Ldg. 17. Consequently, it is necessary to create zones around schools and playgrounds that are free of all publicly visible tobacco advertising to address this effect. JA 197, 207, 123-125; *see also* JCA 2242-2271.

In settling its litigation under the MSA, Massachusetts did not agree to refrain from regulation of tobacco advertising, nor could it have done so. *See United States v. Winstar Corp.*, 518 U.S. 839, 860 (1996) (government may not contract to surrender certain reserved powers), *citing Stone v. Mississippi*, 101 U.S. 814, 817 (1880) (legislature cannot contract away power of a State to regulate public health and public morals). Petitioners' suggestion that the State cannot impose incrementally broader restrictions than those in the MSA is therefore misplaced. Pet. Br. 43. The Attorney General recognized, when he proposed the regulations months before the MSA was executed, that it was necessary to create zones around

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beer labels made no rational sense where government failed to prohibit disclosure of alcohol content in wines and spirits).

schools and playgrounds that are free of publicly visible tobacco advertising. The MSA falls far short of that goal. Retail tobacco advertising is largely unrestricted under the MSA. JA 259, 263-264.[22] Yet retail stores display a great deal of both exterior and interior tobacco advertising. JA 95, 179. Moreover, since the execution of the MSA, petitioner cigarette companies have substantially *increased* their total advertising expenditures and, in particular, their expenditures for exterior retail advertising. Ldg. 27, 28. These expenditures have translated into increased youth exposure to retail tobacco advertising, as documented in a 2000 University of Illinois study. Ldg. 61-62. The fact that petitioners have intensified their advertising in areas left unrestricted by the MSA — and in places where it will reach young people — is firm proof of the continuing need for the Massachusetts regulations.

3. The regulations are narrowly tailored in targeting advertising near schools and playgrounds.

The final question under *Central Hudson* is whether the speech regulation is "more extensive than necessary" to serve the governmental interest that supports it. *Central Hudson*, 447 U.S. at 566. The First Amendment demands "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . . [* * *] Within those bounds we leave it to governmental

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[22] The MSA permits exterior retail advertising not larger than 14 square feet, JA 259, which easily accommodates most advertising commonly displayed on and near retail stores. The MSA places no restrictions on interior retail advertising. And, of course, the MSA binds only the cigarette companies that signed it; it does not restrict advertising by smokeless tobacco or cigar companies, by cigarette companies that are not signatories, or by cigarette companies that might enter the market in the future.

decisionmakers to judge ... manner of regulation may best be employed." *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citations and quotation marks omitted). *See Edge Broadcasting*, 509 U.S. at 429-435. Those laws that have failed this aspect of *Central Hudson* "burden substantially more speech than necessary," *Edge Broadcasting*, 509 U.S. at 430, or amount to an outright ban on the dissemination of important product information. *See, e.g., 44 Liquormart*, 517 U.S. at 497-498, 501; *Virginia Bd. of Pharmacy*, 425 U.S. at 770. *Cf. Bates*, 433 U.S. at 355 (broad prohibition on advertising by lawyers).

Because the regulations do not affect tobacco advertising outside the school and playground zones, or in magazines, newspapers, direct mail or other media, they are appropriately tailored to address the State's interest. Petitioners remain free to communicate information concerning price and product attributes to adults through these permitted channels. *See Florida Bar*, 515 U.S. at 633-634 (availability of alternative channels for commercial speech favors sustaining regulation). These factors, and those discussed below, demonstrate that the regulations clearly satisfy the fourth prong of the *Central Hudson* test.

1. The regulations target tobacco advertising that is seen repeatedly and unavoidably by children. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974), *quoting Packer Corp.*, 285 U.S. at 110. This reflects narrow tailoring. *See Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 744 (plurality) (upholding restrictions on sexually explicit programming that can be seen by children "without sufficient prior warning"); *Pacifica Foundation*, 438 U.S. at 749-751 (upholding order prohibiting daytime broadcast of "Filthy Words" monologue that was "uniquely accessible to children, even those too young to read"). Even where the Court, applying strict scrutiny, invalidated a

complete ban on "dial-a-porn" services, it observed that the government might constitutionally restrict "public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid." *Sable Communications*, 492 U.S. at 127-128. Children cannot be presumed "to protect themselves from speech which . . . generally may be avoided by [unwilling adults] through the exercise of choice." *Pacifica Foundation*, 438 U.S. at 757-758 (Powell, J., concurring). *See id.* at 748-750 (majority). Thus, the regulations are necessary, and valid, even though they incidentally reduce the volume of tobacco advertising that adults view. *See Greater New Orleans Broadcasting Ass'n.*, 527 U.S. at 194 (government may "incidentally . . . restrict a certain amount of [commercial] speech" that is not the object of its concern if it does so to achieve a broader, legitimate objective).

Carey v. Population Services International, 431 U.S. 678 (1977), upon which petitioners rely heavily, does not control here. Pet. Br. 36-37. In *Carey*, the Court struck down a New York law that prohibited *all* contraceptive advertising, noting that such advertising "state[s] the availability of products and services that are not only entirely legal, but *constitutionally protected*." 431 U.S. 701 (emphasis added, citations omitted). But even *Carey* "left open the possibility that the State could implement more carefully drawn restrictions." *Central Hudson*, 447 U.S. at 565-566. In his concurring opinion in *Carey*, Justice Powell discerned nothing in the Court's decision "to cast any doubt on the authority of the State to impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young." *Carey*, 431 U.S. at 712 (Powell, J., concurring in part); *see id.* at 716-717 (Stevens, J., concurring in part). The Massachusetts regulations, which impose limited restrictions on a product illegal for sale to minors, are not invalid under *Carey*.

2. Petitioners make no argument under *Central Hudson*'s fourth prong that the regulations fail reasonably to "fit" the State's interest. *See Fox*, 492 U.S. at 480. That is, petitioners do not dispute that children will frequently be exposed to tobacco advertising when they walk, gather and play in areas around their schools and playgrounds. Indeed, since 1990, the cigarette industry's voluntary advertising code has prohibited cigarette advertising on billboards that are within 500 feet of any school or children's playground and the distribution of free tobacco samples "within two blocks of any centers of youth activities, such as playgrounds [and] schools . . . ." JA 98-99. The Attorney General's reasonable determination to draw the line at 1,000 feet (approximately three blocks) is entitled to deference. *Fox*, 492 U.S. at 480.[23] *Cf. Hill v. Colorado*, 120 S.Ct. 2480, 2495 (2000) (according a "measure of deference" to legislature's judgment in setting health clinic buffer zone); *Burson*, 504 U.S. at 209-210 (declining to require "proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud"). *See also Grayned v. City of Rockford*,

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[23] The FDA's proposed rule would have prohibited all outdoor tobacco advertising within 1,000 feet of schools and playgrounds. JA 235. The FDA stated that these "are places where children and adolescents spend a great deal of time and should therefore be free of advertising for [tobacco] products." *Id.* *See* JA 235-237. The FDA found particular reasons to prohibit signs on retail stores in these zones: "Young people are more likely to frequent stores near schools, especially older adolescents, and these venues should therefore be free of advertising for tobacco products." JA 236. *See* Ldg. 62 (study reporting that "three out of four teenagers visit a convenience store at least once per week"). Studies in Massachusetts and elsewhere have shown that there is more tobacco advertising on signs "in and around stores near schools and playgrounds than in stores generally." JCA 1555. *See* JA 105-106; 235-238; JCA 1528, 1552; Ldg. 62.

408 U.S. 104, 117-120 (1972) (recognizing "special characteristics of the school environment").[24]

Nonetheless, petitioners argue that the Attorney General's determination to restrict advertising to a distance of 1,000 feet from schools and playgrounds is overbroad because the restricted areas may be substantial in three urban settings. Pet. Br. 45. Such a discrete claim is out of place in this facial challenge to the regulations. *See INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (declining to address "as-applied" claims in facial challenge).[25] In any event, the fourth prong does not inquire, in the abstract, whether a regulation will be far-reaching. If that were the case, the Court would not have upheld San Diego's complete ban on off-site commercial billboard advertising. *Metromedia*, 453 U.S. at 505-512 (plurality). *Cf. Renton*, 475 U.S. at 53 (reasonable alternatives for communication existed where five percent of the city's land area remained open for potential use as adult theater sites). Rather, *Central Hudson* asks whether the regulation goes more than "marginally beyond what would adequately have served the governmental interest." *Fox*, 492 U.S. at 479. By

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[24] Moreover, by restricting interior retail advertising placed below five feet, the regulations prevent the exposure of young children to tobacco advertising that may be proximate to products they purchase and that is obviously not positioned to reach adults. *See* JCA 2384-85. Similar forms of display restrictions have been upheld with respect to adult magazines. *See, e.g., Upper Midwest Booksellers Ass'n. v. City of Minneapolis*, 780 F.2d 1389, 1394-95 (8th Cir. 1985) (upholding ordinance requiring that adult magazines be displayed for sale in sealed packages with opaque covers).

[25] Petitioners may not bolster their facial challenge by reliance on the overbreadth doctrine, which is inapplicable to commercial speech. *See Fox*, 492 U.S. at 481.

that measure, the Massachusetts regulations should be upheld.

3. In these circumstances, there are no "obvious less burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 507 U.S. at 417, n.13. Regardless of the State's other tobacco control initiatives, "[e]fforts to prevent the onset or continuance of tobacco use [will] face the pervasive, countervailing influence of tobacco promotion by the tobacco industry . . . ." Ldg. 2. Because the State seeks to curb this influence in areas children frequent, the advertising restrictions represent the logical, practical and direct solution to the problem. *See Fox*, 492 U.S. at 479 (noting that, in *Metromedia*, 453 U.S. at 508, it was enough for the city to conclude that the billboard ban was "perhaps the only effective approach").

Petitioners argue that several nonspeech forms of regulation — essentially stepped-up enforcement of the youth sales law — should substitute for the advertising regulations. Pet. Br. 45.[26] Through its advertising

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[26] Indeed, this is the focus of the other provisions of the regulations, which increase a retailer's responsibility to determine the ages of tobacco purchasers and prohibit self-service displays, distribution of free samples, and other practices that facilitate minors obtaining tobacco products. 940 C.M.R. §§ 21.04(1)-(4), 22.06(1)-(4), Pet. App. 108a-110a, 120a-123a. Although demanding that the State do more to restrict youth access to tobacco, certain petitioners have challenged under the First Amendment the requirement that tobacco products be kept "out of reach of all consumers," despite this provision's obvious anti-theft justification. Pet. Br. 5 n.2. Because the prohibition of self-service displays is a restriction on the physical location of the actual tobacco product, the court of appeals correctly held that it does not implicate the First Amendment. Pet. App. 35a-37a. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982).

restrictions, however, Massachusetts seeks to reduce youth *demand* for tobacco products, something increased law enforcement simply cannot do.[27] In addition, a 1997 survey indicated that only 33.4% of Massachusetts students who smoke cigarettes usually obtain them by buying them in a store. JA 290. Even perfect enforcement of the tobacco sales law would not address tobacco use by those minors who get their cigarettes other ways. *Id.* For these and other reasons, federal health authorities recommend that the State implement *comprehensive* measures to address youth tobacco use, including enforcement of the tobacco sales laws, youth-targeted advertising restrictions, tobacco health education programs and counter-tobacco advertising. JA. 212; Ldg. 11. With the promulgation of the challenged regulations, Massachusetts put all of these necessary elements in place. JA 90-96; Ldg. 13-15.

The petitioners have identified nothing remotely similar to the untried, "obvious" and clearly effective alternatives described in cases that have found this factor significant. *See, e.g., 44 Liquormart*, 517 U.S. at 507 ("perfectly obvious" that goal of higher alcohol prices could be achieved by direct price regulation or increased taxes, rather than an advertising ban); *Discovery Networks*, 507 U.S. at 417 (city could have addressed safety and aesthetic concerns regarding newsracks by directly regulating their size, shape, appearance or number, rather than banning only those with a commercial content).[28] Where Massachusetts

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[27] As the Utah Supreme Court recognized: "It is almost useless to pass laws prohibiting the sale of tobacco to minors, and at the same time make no attempt to restrict the solicitation of these same minors by all kinds of alluring and attractive advertisements." *Packer Corp.*, 297 P. at 1017.

[28] The petitioners' only proposal which is not implemented in Massachusetts is criminalizing or prohibiting the possession of tobacco by minors. Whether it would be good

has a nationally recognized tobacco control program, but nonetheless continues to experience unacceptable levels of youth tobacco use, the *Central Hudson* test does not require extensive second guessing of its decision to restrict advertising: "Our commercial speech cases recognize some room for the exercise of legislative judgment." *44 Liquormart*, 517 U.S. at 508 (plurality), *citing Metromedia*, 453 U.S. at 507-508.

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For the reasons explained above, the Massachusetts regulations do not warrant heightened review. The regulations would, however, meet strict scrutiny even if that test applied. Under a strict scrutiny standard, "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling state interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications,* 492 U.S. at 126. The protection of children is a compelling state interest, *id.*, which clearly is furthered by these advertising restrictions. *See supra* at 36-42. The regulations are also sufficiently narrowly tailored to meet even strict scrutiny. They leave numerous channels for speech to adults. And, for the State to prevent harm to children from tobacco advertising they will unavoidably confront near their schools and playgrounds, there is no "less restrictive" alternative — indeed *no* alternative — to prohibiting its display. *Cf. United States v. Playboy Entertainment Group*, 529 U.S. 803, 826-827 (2000) (capacity for individual households to block sexually explicit cable channels provided less

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public policy to criminalize tobacco possession, with its attendant burden on law enforcement resources, while affording minors no protection from pervasive tobacco advertising, is open to debate. *See* Ldg. 10. Neither the Surgeon General nor the CDC *Best Practices* Report includes this as a recommended tactic in tobacco control. Ldg. 2, 11; JCA 679-686.

restrictive alternative, protective of children, to broad restriction of indecent speech). Thus, the Massachusetts regulations, which address one of the State's — and indeed the Nation's — most urgent problems, are fully consistent with the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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I. The Massachusetts Regulations Are Preempted

Respondent's preemption arguments are unsupported by the text of FCLAA, fail to explain the 1969 amendments expanding § 5(b), and ignore legislative history showing that § 5(b) was intended to apply to local advertising bans.

1. Respondent declines to defend the First Circuit's holding that restrictions on the display of tobacco advertising "[do] not impose obligations 'with respect to' advertising" under FCLAA. Pet. App. 10a (citation omitted). Instead, Respondent attempts to ground a content/location distinction in the "based on smoking and health" clause. The Government and virtually all of the *amici* take the same approach; indeed, the Government explicitly disavows any reliance upon the Court of Appeals' construction of the "with respect to . . . advertising" clause. U.S. Br. 18 n.7. Respondent and his *amici* thus effectively concede that the First Circuit erred in its resolution of the first question presented by the Petition.

2. The effort to ground a content/location distinction in the "based on smoking and health" clause is likewise unavailing; indeed, the Second Circuit correctly labeled it "sophistry." *Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100, 108 (2d Cir. 1999). The plain language of the clause includes *all* state law duties that are "based on smoking and health," whether in purpose or in effect.

a. Respondent concedes that the regulations are based on "health concerns" about tobacco, *see* Resp. Br. 21 n.10; *see also* J.A. 248-52, but he contends that the regulations are nonetheless not "based on smoking and health" because they are *also* "based upon" other concerns. Resp. Br. 20. The First Circuit properly rejected this argument, Pet. App. 13a n.6, which is inconsistent with the text of § 5(b). A regulation does not cease to be "based on smoking and health" simply because it is also based on something else. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106 (1992) ("Our

precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one."). There are few, if any, regulations that could not be said to serve more than one purpose; Respondent's exclusion of dual-purpose regulations from § 5(b) would therefore gut the provision. *Id.* (where preemption is defined partly by purpose, States cannot evade preemption "'simply by publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective'") (citation omitted).

Respondent also contends that the regulations are not "based on smoking and health" because they were promulgated pursuant to "the general proscription on unfair practices under the Massachusetts Consumer Protection Act." Resp. Br. 25. The Court in *Cipollone* explicitly rejected the notion that the basis of a state law duty could be analyzed at such a high level of generality. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530 n.27 (1992) (plurality); *id.* at 553 (Scalia, J., joined by Thomas, J.) (such an approach "would gut the statute"). That the regulations were issued under a generic statute does not change the fact that they target cigarette advertising "based on" the health risks of smoking.[1]

b. The Government contends that § 5(b) preemption is limited to state laws whose *operation* is "based on" smoking and health and does not include laws whose *purpose* is "based on" smoking and health. U.S. Br. 9, 11. This argument fails

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[1] Respondent's argument also overlooks the fact that *Cipollone* examined the "level of generality" of a state law duty *only* in the context of analyzing state *common law* theories. Of course, the relevant common law rules had not been *adopted* "based on smoking and health," and the Court therefore necessarily analyzed the issue in terms of whether the theories invoked were, *in their operation*, "based on smoking and health." *See, e.g.*, 505 U.S. at 524 ("failure to warn" claim was preempted because it required showing that cigarette advertising "should have included additional, or more clearly stated, warnings"); *id.* at 554 (Scalia, J.).

on its own terms: the challenged regulations "operate" based on smoking and health because, by *specifically* prohibiting outdoor tobacco advertising, they directly and substantially eliminate the public display of federally prescribed warning labels. *Cf.* AMA Br. 9 n.3 (total bans "obviously affect advertising content by eradicating it altogether"). More fundamentally, the argument that § 5(b) only preempts regulations that *operate* based on smoking and health cannot be reconciled with the statutory text.

Nothing in the text supports the Government's effort to read § 5(b) as excluding consideration of the purposes that underlie a regulation. In common parlance, "based on" includes "what *underlies* a belief, a system of thought, a judgment, a hope, and so on." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 181 (1968) (usage note) (emphasis added). This common understanding is reflected in Respondent's Brief, which (unlike the Government's Brief) uses "based on" in a motivational sense: Respondent defends the regulations on the ground that they are "based upon" various substantial interests in addition to the health effects of smoking. *See supra* at 1-2. The Government's attempt to rewrite § 5(b) as if it applied only to "requirement[s] or prohibition[s] *which operate* based on smoking and health" violates the settled rule that the courts may not add limiting terms that Congress has not included. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993).

The Government also speculates that, had Congress intended to preempt obligations whose *purpose* is "based on smoking and health," it would "probably" have used "because of" rather than "based on." U.S. Br. 10. But the Government cites no authority for its dubious premise that Congress uses the phrases "based on" and "because of" as having significantly different meanings. Indeed, quite the opposite appears true.

Cf. 42 U.S.C. § 2000e(k) (Title VII) (using "because of" and "on the basis of" interchangeably).[2]

The Government argues that the phrase "based on smoking and health" becomes surplusage if it is read to include tobacco-specific obligations adopted *because of* smoking and health. U.S. Br. 11; *see also* Resp. Br. 21. That is wrong. Not every tobacco-specific regulation is motivated by health-related concerns, as a quick glance at the code books confirms. *See, e.g.*, Mass. Gen. Laws, ch. 64C, § 14 (making it unlawful to advertise cigarettes at less than cost if done "with intent to injure competitors"). Moreover, "based on smoking and health" is hardly surplusage; its elimination would dramatically expand § 5(b) to prevent *any* state law "with respect to advertising or promotion" from being applied to cigarettes. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996).[3]

3. The constructions of § 5(b) urged by Respondent and his *amici* also fail to give effect to the 1969 amendments.

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[2] The Government also contends that, if Congress had meant to refer to underlying purposes, it would have placed the phrase "based on smoking and health" after the word "imposed." U.S. Br. 10. This argument misunderstands Petitioners' position. The Government's alternative phrasing would dramatically narrow the statute to cover *only* obligations that are "based on" smoking and health in a motivational sense; Petitioners' point is that the language Congress chose covers *all* obligations "based on" smoking and health, whether in purpose *or* in effect.

[3] The Government is likewise wrong in contending that an operational limitation is necessary to avoid difficult inquiries into subjective motive. U.S. Br. 11. It is not unusual for Congress to adopt a preemption provision that takes motivation into account. *See, e.g., Gade*, 505 U.S. at 105 ("[P]art of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part . . . by the state law's actual effect.") (citation omitted). And to the extent that the health-based nature of the regulation is not already apparent on the law's face, the record is likely to be (as here) "replete" with such references. *See, e.g., Greater N.Y. Food Council*, 195 F.3d at 108.

a. Two changes in the 1969 amendments made the preemption of state law "much broader": (1) the new § 5(b) "bars not simply 'statement[s]' but rather 'requirement[s] or prohibition[s]'"; and (2) the amended provision "reaches beyond statements '*in* the advertising' to obligations '*with respect to* the advertising or promotion' of cigarettes." *Cipollone*, 505 U.S. at 520 (plurality) (emphasis added). Respondent acknowledges the first change, conceding that the 1969 Act "enlarged the *forms* of state law" that were preempted to include not just statutes and regulations, but also state common law. Resp. Br. 26 n.13. Respondent denies, however, that the second change had any effect, insisting that "the 1969 amendments to § 5(b) did not expand the *substantive* scope of preemption." *Id.* Respondent's failure to give effect to this "substantial difference[] in language," *Cipollone*, 505 U.S. at 520 (plurality), violates the settled rule "requiring a change in language to be read, if possible, to have some effect." *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992).

Respondent and his *amici* rely on *Cipollone*'s observation that "the phrase 'relating to smoking and health' . . . was essentially unchanged by the 1969 Act." 505 U.S. at 529 (plurality); Resp. Br. 26; U.S. Br. 15-16. But while Congress did not materially alter what is now the "based on smoking and health" clause, it did substantially alter the phrase that this clause modifies: the Act's preemption is no longer limited to "*statement[s]* relating to smoking and health . . . *in the advertising*" of cigarettes, but now extends to "*requirement[s] or prohibition[s]* based on smoking and health . . . *with respect to the advertising or promotion*" of cigarettes. *Compare* Pub. L. No. 89-92, § 5(b), 79 Stat. 282, 283 (1965) *with* Pub. L. No. 91-222, § 2, 84 Stat. 87, 88 (1970) (emphases added). Had Congress intended § 5(b) to remain limited to content regulation, there would have been no need to make this significant change.

Neither Respondent nor his *amici* have come up with *any* plausible explanation for this amendment. The answer suggested by the text is fatal to their position: by adding the word "prohibition" and changing the phrase "in the advertising" to "with respect to the advertising," Congress altered the language of § 5(b) so that it now covers health-based *bans* on advertising.

b. The legislative history of the 1969 amendments confirms this reading of § 5(b).

There had been substantial debate whether the 1965 version of § 5(b) (which applied both to federal agencies and to the States) preempted a *prohibition* of advertising in specified media or locations. The FCC Chairman testified that the old § 5(b) precluded the agency from adopting a television ban, *see, e.g., Cigarette Labeling and Advertising — 1969, Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 214 (1969) ("House Hearings"), but the D.C. Circuit, in upholding application of the "fairness doctrine" to cigarette advertising, suggested that the provision reached only required additional *statements*. *Banzhaf v. FCC*, 405 F.2d 1082, 1090 (D.C. Cir. 1968). When California was considering a ban in 1969 on both *cigarette billboards* and in-state television advertising, the state Attorney General's office opined that the proposal would violate the old § 5(b), *see* Letter from Cal. Dep. Atty. Gen. J. Frazier to Cal. Sen. J. McCarthy 2-7 (July 11, 1969) (Lodging 15-20), but the California Legislative Counsel's office took the opposite view, *see* Letter from Cal. Dep. Legis. Counsel E. Bershatsky to Cal. Sen. A. Beilenson 4-7 (Apr. 21, 1969) (Lodging 6-9). Nor was California alone in considering prohibitions on cigarette advertising: a proposal in the New York City Council in 1969 would have made it illegal to display in any "place of public assembly or public conveyance, any matter or material which encourages cigarette smoking." *See* N.Y. City Bill No. 987, § 1 (Apr. 24, 1969) (Lodging 30-31).

Although the House Report acknowledged the conflict of opinion, H.R. Rep. No. 91-289, at 3-5 (1969), the House version of the 1969 Act would have left the preemption language *verbatim* unchanged. The Senate was apparently unwilling to perpetuate this confusion. During Senate hearings, the major cigarette manufacturers expressed their willingness to cease all television and radio advertising, thereby mooting any further need to preempt the FCC. *See Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm., Commerce Comm., U.S. Senate*, 91st Cong., 103 (1969) ("Senate Hearings"). In analyzing what should then be done with the preemption provision, Senator Magnuson, the chairman of the Senate Commerce Committee, engaged in an extended colloquy with a tobacco industry representative who specifically urged that the FCLAA should preempt laws "banning cigarette advertising in a particular locality." *Id.* at 102. Senator Magnuson agreed with the witness that "you make a point" as to "what we do with the preemption clause as the House passed it," and he specifically stated that, among the sorts of local regulations that could lead to "chaos" were advertising bans *such as those proposed in California and New York City*. *Id.*

The subsequent amendments made by the Senate Committee resolved the question whether bans would be preempted.[4] The Committee removed the preemption of the FCC, added a statutory prohibition on cigarette advertising in television and radio, and added a new provision that temporarily barred the FTC from requiring warnings in cigarette advertising. With the federal agencies thus covered, § 5(b) preemption was limited only to the States, but its scope was expanded specifically to include "prohibitions" and to reach, not just required

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[4] In this sense, the Senate amendments "clarified" the preemption provision. S. Rep. No. 91-566 at 12. The argument that the 1969 Amendment "*merely* 'clarified'" § 5(b) without altering its substantive sweep was explicitly rejected in *Cipollone*. 505 U.S. at 520 (plurality).

"statements . . . in advertising," but also "prohibitions . . . with respect to" advertising. 115 Cong. Rec. 38732 (1969). The Senate Report confirmed that these changes to § 5(b) were intended, *inter alia*, to preempt "health-related . . . prohibition of cigarette advertising by any State or local authority." 1970 U.S.C.C.A.N. 2652, 2652.[5] *See Cipollone*, 505 U.S. at 539 (Blackmun, J., joined by Kennedy and Souter, JJ.) (purpose was "to ensure that a State could not do through negative mandate (*e.g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate").

4. Respondent is wrong in contending that Massachusetts' near-total ban on outdoor advertising does not interfere with the purposes of the Act. The "comprehensive Federal program" described in § 2, *see* 15 U.S.C. § 1331, is undermined not merely by state laws that seek to change or add to the federal warning, but also by "diverse, nonuniform" state regulations that implicitly deem the federal warning inadequate by *banning* cigarette advertising. *See Cipollone*, 505 U.S. at 539 (Blackmun, J.). Indeed, that comprehensive program itself includes its own *ban* (on television and radio). And *Cipollone* held that the leftover hortatory language of § 2 (unchanged by the 1969 Act) is *not* a "sufficient basis for rejecting the plain meaning of the broad language that Congress added." *Id.* at 521 n.19 (plurality).

5. Respondent's reliance on a "presumption against preemption" is unavailing. The text and legislative history confirm that Congress *did* in fact intend to limit the State's ability to enact health-based regulations of cigarette advertising. Accordingly, the Court's "task is simply to ascertain the fair meaning" of the statutory terms. *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214,

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[5] Respondent relies on the absence of explicit mention in the legislative history of a Utah statute making it unlawful to display cigarette advertising. But this "dog that didn't bark" theory is unavailing when the legislative history clearly reveals that other dogs *did* bark.

224 (1992); *see also Egelhoff v. Egelhoff*, 121 S. Ct. 1322, 1330 (2001). Moreover, the alleged encroachment on the State's police powers is overstated: "zoning" interests can be "adequately address[ed]" by "[g]enerally applicable laws" that are not based on smoking and health in purpose or effect. Resp. Br. 21. Respondent concedes that the reason for singling out tobacco advertising is the "grave health consequences of cigarettes," *id.*, but that is the field Congress occupied in § 5(b).

There is likewise no merit to Respondent's suggestion that a plain language reading of § 5(b) "would grant cigarette manufacturers the right to advertise in any location, in any community." Resp. Br. 17. The suggestion is particularly ludicrous as applied to these Petitioners, whose advertising is already severely restricted by the MSA. JA 259-71. In any event, cigarette advertising, as noted, remains subject to generally applicable zoning restrictions. In addition, given that § 5(b) permits States to ban *sales* to minors, it presumably permits them to ban deliberate conspiracies, knowing attempts, and direct and intentional solicitation of such unlawful sales. This is sufficient to rebut the parade of horribles recited in the briefs of Respondent and his *amici*. In any event, as this Court observed in rejecting a similar argument in the context of preemption of state regulation of airlines, the federal Government retains sufficient authority in this area. *Morales v. Trans World Airlines*, 504 U.S. 374, 390-91 (1992).

II. The Regulations Violate the First Amendment[6]

A. Strict Scrutiny Applies

This case underscores the inherent limitations of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S.

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[6] Even if the preemption issue is resolved in Petitioners' favor, the Court must resolve the First Amendment issue because it is the only issue in No. 00-597. *Compare Ashwander v. TVA*, 287 U.S. 297, 347 (1936) (Brandeis, J., concurring).

557 (1980). The malleability of intermediate scrutiny is, as several members of the Court have suggested, not well suited to the review of regulations that deliberately suppress truthful commercial speech based on its message. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501-03 (1996) (plurality). Application of a "balancing test" in such a case inevitably descends into subjective judgments about the value of the ideas expressed — a point the opinions below make painfully clear. *See, e.g.*, Pet. App. 66a-67a (suggesting that the level of First Amendment protection for commercial speech varies depending upon whether the product is "socially- or politically- important"). This inherently subjective approach contradicts basic First Amendment principles.

Respondent effectively concedes that strict scrutiny applies to content-based commercial speech restrictions that do *not* regulate the "characteristics of commercial speech that justif[y] depriving if it of full First Amendment protection." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); *44 Liquormart*, 517 U.S. at 499 (plurality). Instead, Respondent asserts that his regulations make an "appropriate content distinction." Resp. Br. 31 n.15. But that is wrong. By banning *all* outdoor commercial speech expressing *any* favorable idea about tobacco in up to 91% of the State's major cities (not to mention the further restrictions on in-store advertising), the regulations make precisely the sort of distinction to which strict scrutiny should apply. This Court's cases make clear that where a State suppresses a substantial amount of speech directed to *adults* and the applicability of the regulations turns solely on the *ideas* expressed, strict scrutiny applies — even if the State's purpose is to shield children. That general principle applies with full force to regulations that suppress nonmisleading *commercial* speech aimed at adults based on its message: such regulations "are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression — the core of First Amendment

values." *Carey v. Population Services, Int'l*, 431 U.S. 678, 702 n.28 (1977).

1. This Court has held that, even when government tries to shield children from age-inappropriate speech (*e.g.*, indecent speech), content-based regulations that suppress a substantial amount of otherwise lawful adult speech are subject to strict scrutiny. "[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000). In *Reno v. ACLU*, 521 U.S. 844, 874 (1997), the Court applied strict scrutiny to the Communications Decency Act because "[i]n order to deny minors access to potentially harmful speech, the [Act] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."

Notwithstanding the substantial interest in protecting children from indecent speech, the Court applied strict scrutiny in these cases because content-based suppression of speech aimed at adults creates the risk that the government may be attempting "to silence dissenting ideas." *Playboy*, 529 U.S. at 818. That rationale applies with full force here. A regulation that suppresses a large amount of truthful commercial speech to adults, and that does so based on the ideas expressed, "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387 (citation omitted) (extending this principle to *unprotected* speech); *see also 44 Liquormart*, 517 U.S. at 501 ("Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression.").

Respondent contends that (despite Massachusetts' self-proclaimed "war on Big Tobacco," JA 248) any concern about censorship is misplaced because the State merely "seeks to

address a harm." Resp. Br. 33. But good intentions do not dispel the "possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. "'Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (citation omitted). Strict scrutiny is triggered by the *means* the State chooses. Here, to protect children, Respondent has "effectively suppresse[d] a large amount of speech that *adults* have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874 (emphasis added).

2. Respondent argues that, *even if* "complete suppression" of commercial speech promoting an idea is subject to strict scrutiny, the regulations here are subject to "the intermediate level of scrutiny traditionally associated with various forms of 'time, place, and manner' regulations." Resp. Br. 31. The Court has made clear, however, that regulations cannot be sustained as "time, place, and manner" restrictions unless they are content-neutral. The Court applies the *same* requirement to restrictions on commercial speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-30 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.18 (1983). The Court's disposition of a similar "zoning" argument in *Reno* is therefore controlling. In *Reno*, the Government argued that restrictions on Internet access to indecent speech were "cyberzoning" and thus mere "time, place, [or] manner" regulations. The Court rejected this argument, precisely because the restrictions were not "content neutral." 521 U.S. at 868. The same rule applies here. *Linmark Assoc., Inc. v. Willingbro Tp.*, 431 U.S. 85, 94 (1977).[7]

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[7] Nor can the regulations be deemed content-neutral under a "secondary effects" theory. Here, as in *Reno*, the avowed "purpose of the [regulations] is to protect children from the primary effect[]" of the speech, *i.e.*, from the message itself; such a "content-based blanket restriction on speech cannot be 'properly analyzed as a form of time, place, and manner regulation.'" 521 U.S. at 868 (citation omitted).

3. Contrary to Respondent's contention, the State has not merely regulated the characteristics of commercial speech that justify "'depriving it of full First Amendment protection.'" Resp. Br. 32 (quoting *R.A.V.*, 505 U.S. at 388-89).

a. The State's greater power over commercial speech is a concomitant of its authority to regulate the transactions proposed in the advertising. *See, e.g., Edenfeld v. Fane*, 507 U.S. 761, 767 (1993); *see also 44 Liquormart*, 517 U.S. at 498-500 (plurality). The integrity of commercial bargains depends upon the information available to the parties; the State's power to "preserve a fair bargaining process" therefore includes the power to proscribe false and misleading claims about a product, as well as the power to require disclosure of "additional information, warnings, and disclaimers." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976); *44 Liquormart*, 517 U.S. at 498. Particular methods or devices may present similar concerns about undue influence, overreaching, or harassment. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 630 (1995) (direct-mail solicitation within 30 days of an accident); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978) (lawyer's in-person solicitation in hospital room). And the power to prohibit certain transactions includes the power to prohibit speech that solicits those illegal transactions. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

The Court has insisted, however, that the State's power over commercial *transactions* does not give it authority to suppress disfavored messages simply because they appear in commercial speech. *44 Liquormart*, 517 U.S. at 501; *R.A.V.*, 505 U.S. at 388-89; *Linmark*, 431 U.S. at 96; *Carey*, 431 U.S. at 701 & n.28. Thus, the State may not use its power over the "commercial aspect" of truthful speech to ban "the substance of the information communicated." *Linmark*, 431 U.S. at 96.

b. As the case comes to this Court, the State does *not* defend the regulations on the ground that they merely regulate

speech that is false and misleading. Rather, Respondent argues that even if pro-tobacco speech is nonmisleading, the State has the power to prohibit adult speech on the ground it might unduly influence minors. Resp. Br. 33.

The flaw in Respondent's theory is that it rests, not on the alleged "undue influence" of any particular advertising device or method, but on the alleged undue influence of *ideas*. Although Respondent complains that Petitioners' advertising is "rich in images with youthful appeal," Resp. Br. 33, nothing in the regulations purports to proscribe only images with uniquely distinctive appeal to children, while leaving open other speech to adults. *Cf.* JA 260 (MSA provision forbidding use of "cartoons" in cigarette advertising). The regulations largely exclude from the public square any "pro-tobacco" idea, *no matter how or to whom expressed*. On the theory that any remotely positive reference to tobacco products is harmful for children, the regulations bar even the most unimaginative messages — such as signs displaying brand names, tar or nicotine levels, length, or price. Indeed, Petitioner Peretti in No. 00-597 notes that the regulations will require it to remove the sign on its century-old store near Boston Common — the offending speech: "Tobacconist."

Nor do the regulations focus on the "undul[y] influenti[al]" device of "heavily promoting" tobacco products "near schools and playgrounds." Resp. Br. 32. The applicability of the restrictions does not turn on whether tobacco is "heavily promoted" in a given area: the regulations forbid even a single publicly displayed advertisement, even a pre-printed retail door sign with the Marlboro logo and the words "Push to open."

Respondent repeatedly characterizes the regulations as applying only "near" playgrounds and schools. But this is rhetoric, not reality. The regulations' undisputed effect is to eliminate all outdoor tobacco advertising in up to 91% of major metropolitan areas. The forbidden zones are thus "near" schools and playgrounds only in the sense that *everything* in an

urban area is near schools and playgrounds. This is not a case where the State has enacted a regulation that has a *de minimis* effect on adult speech — prohibiting tobacco advertising, for example, only in locations uniquely dedicated to children (such as schoolyards, little league fields, or high school newspapers).[8]

Respondent contends that application of strict scrutiny would grant tobacco companies a First Amendment right to target children in their advertising. Resp. Br. 32-35; U.S. Br. 28-30. This is nonsense.[9] Solicitation of unlawful sales is not protected, *see Bates*, 433 U.S. at 384, and Petitioners do not contend otherwise. But not every favorable tobacco message that may be publicly seen by a child constitutes "solicitation" of an illegal sale. The State's power to ban solicitation does not give it the far broader power to ban *any* speech that, in the State's view, might ultimately cause any minor to seek an unlawful sale. Indeed, *Carey* rejected just such an argument.

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[8] For similar reasons, Respondent cannot avoid strict scrutiny simply because the State's suppression is not yet total. *See Playboy*, 529 U.S. at 812 ("[i]t is of no moment that the statute does not impose a complete prohibition"); *id.* at 812-13 (regulations that effectively silence the speech for "two-thirds of the day" are tantamount to a "blanket ban").

[9] The Government's parade of horribles ignores the fact that the state *may* regulate the characteristics of commercial speech that justify "depriving it of full First Amendment protection." *R.A.V.*, 505 U.S. at 388-89. The state may regulate *misleading* speech (*e.g.*, 15 U.S.C. § 1336); require *disclosures* about a product (*e.g.*, 21 U.S.C. § 343(r)); and regulate even fully protected speech in pursuit of interests (*e.g.*, personal privacy, 15 U.S.C. §§ 1681, 6501) unrelated to suppression of ideas. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The only non-frivolous question posed by the Government concerns FCLAA's ban on cigarette advertising on television and radio, 15 U.S.C. § 1335. *See* U.S. Br. 28. The question, however, is largely hypothetical, because Petitioners voluntarily agreed to eliminate all television and radio advertising *before* the ban was enacted 31 years ago, have never challenged the ban, and have no intention of doing so. At any rate, the validity of such advertising regulations turns in large measure on "the special problems of the electronic broadcast media," which are not in this case. *Virginia State Bd.*, 425 U.S. at 773.

In *Carey*, the State argued it could ban contraceptive advertisements because they would "legitimize sexual activity of young people." 431 U.S. at 701. In rejecting this contention, the Court explicitly distinguished between advertisements that "*directly* incited illicit sexual activity among the young" and general advertisements aimed at adults. *Id.* (emphasis added). The Court held that the State could not ban the *latter* unless it was able to satisfy the strictest level of scrutiny—namely, that the advertisements could "be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" *Id.* (citation omitted).[10] Similarly, the State's power to ban advertising aimed at "directly incit[ing]" minors to smoke does not give it the more sweeping authority to ban generic advertisements that the State thinks might ultimately cause some adolescents to want to smoke. Regulations, such as those here, which rest on this latter basis are, as *Carey* suggests, subject to strict scrutiny.

B. The Regulations Fail the *Central Hudson* Test

1. Respondent contends that his burden on the "directly advances" element should be relaxed, because "human experience" suggests a connection between advertising and the initiation of smoking. Resp. Br. 39-40. This Court has observed, however, that it is equally fair to assume that advertising merely shifts existing demand among brands. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 (1999). In any event, Respondent has failed to meet his burden, either on the record below, or with his improper

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[10] Respondent and his *amici* contend that *Carey* is limited to a complete suppression of advertising for "constitutionally protected" products. Resp. Br. 44; U.S. Br. 29. *Carey* made clear that its analysis turned *not* on these features, but on more fundamental principles: the statute was invalidated because it was "clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression — the core of First Amendment values." 431 U.S. at 701 n.28.

supplements before this Court. He has offered no evidence — no study, no expert testimony, nothing — establishing that, on top of the extensive restrictions already in the MSA, these regulations will have any significant *additional* effect in reducing illegal sales or underage smoking.

2. Respondent and the Government maintain that the regulations are not "more extensive than necessary" because they leave alternative channels of communication. Resp. Br. 43; U.S. Br. 24-25. As the First Circuit acknowledged, however, vendors seeking to advertise the availability of Petitioners' products in their stores have *no* meaningful alternative to outdoor signs. Pet. App. 33a. Tobacco advertisements on television and radio are prohibited by federal law. *See* 15 U.S.C. § 1335. Newspaper and magazine advertising is not only prohibitively expensive, but also less effective; consumers who read such advertisements will often be nowhere near the store in question. The fact that the regulations permit tobacco retailers to post outdoor signs in the remaining 10% of their metropolitan areas does not ameliorate the regulations' silencing effect. U.S. Br. 30. Local merchants use signs to reach potential customers *in the neighborhood*. Signs posted in remote locations cannot attract persons passing stores by vehicle or foot.[11] The regulations do not provide a reasonable opportunity for reaching these lawful customers. *Went for It, Inc.*, 515 U.S. at 633-34 (30-day limitation on direct mail to victims leaves "ample alternative channels").

The lower courts' analysis of this issue cannot be reconciled with *Linmark*, *supra*. There, the Court invalidated a restriction on home "For Sale" signs, because the remaining options for home-sellers were "far from satisfactory." 431 U.S. at 93. The only realistic alternatives were newspapers and real estate

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[11] On top of all this, "oral" communications are also barred. Pet. App. 107a. Thus, a shop owner standing in front of his store would be forbidden to answer a passing adult who asks if cigarettes are sold there.

agents, which cost more and were "less likely to reach persons not deliberately seeking sales information." *Id.* So here.

3. If the burden created by the regulations on outdoor advertising addressed to adults is constitutionally "incidental," then "narrow" tailoring means nothing. The broad reach of the restrictions is not minor, insignificant, or unintended. The regulations ban pro-tobacco advertising in 90% of the State's most populated areas.[12] The regulations bar outdoor speech wherever adults are likely to be found, preventing adults from receiving tobacco-related messages when they are out and about in the public square, not just when they are in or "near" schools and playgrounds.

Although Respondent conceded below that the 1,000-foot limit was based on the distance from which it is possible to read a *billboard*, Pet. App. 80a-81a, he applied this same distance uncritically to *all* outdoor advertisements regardless of size.[13] To be sure, Massachusetts *says* it "carefully calculated" the 1,000-foot zone's "costs and benefits," but saying it does not make it so. *See Greater New Orleans*, 527 U.S. at 188.

Bolger and *Carey* make clear the State cannot so broadly ban adult speech in order to shield children. *See Carey*, 431 U.S. at 701; *Bolger*, 463 U.S. at 74. The Government points out that *Bolger* emphasized the ability of parents to control children's exposure to mailed contraceptive advertisements —

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[12] Respondent's claim that the Court may not consider the practical effect of a speech restriction in a facial challenge is frivolous; this Court has consistently considered the practical reach of commercial speech restrictions in facial challenges, *see, e.g., Linmark*, 431 U.S. 93, and *Central Hudson*'s requirement that restrictions be "no more extensive than is necessary" requires just this kind of inquiry, *see, e.g., Went For It*, 515 U.S. at 633-34.

[13] By contrast, the State bans bars only within 500 feet of a school, and permits bars even closer if "the premises are not detrimental to the educational . . . activities of said school." Mass. Gen. Laws ch. 138, § 16C.

control the Government contends is not possible here. U.S. Br. 27 n.10. This argument shows only that there is even *less* justification for the restrictions here. The reason why *Bolger* mentions parental control is because one of the harms the State sought to protect against was *any* exposure of children to the sexually explicit images and messages themselves. Respondent has not suggested and cannot suggest that parents feel a similar need to shield their children's eyes whenever they pass a sign that says "tobacco sold here." The State does not contend that there is anything traumatic, frightening, or psychologically wounding for children in the words or images of tobacco advertisements themselves.[14]

4. Respondent does not deny that the regulatory alternatives identified by Petitioners may reduce underage smoking. Respondent contends, however, that the State need not pursue such options, because "[e]ven perfect enforcement of the tobacco sales law" would not stop children who want cigarettes from getting them. Resp. Br. 47-48. This Court has never suggested that the State may turn to speech restrictions whenever other enforcement mechanisms will fail to ensure *perfect* compliance with state law.

In any event, the State may not enact speech restrictions if direct regulation of conduct "could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995). That rule applies here. Massachusetts has yet to implement some undisputedly available regulatory options (*e.g.*, state-wide licensing requirements for retailers),

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[14] Contrary to Respondent's claim (Resp. Br. 45 n.25), petitioners need not rely on the "overbreadth" standing doctrine, which "enables persons who are themselves unharmed by the defect in a statute" to challenge it based upon the First Amendment rights of third parties. *See Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484 (1989). It is undisputed that the Regulations "act[] directly against the promotional activities of [Petitioners]." *Central Hudson*, 447 U.S. at 565 n.8.

has only recently implemented other measures (*e.g.*, strict identification requirements), and has room to step up enforcement of still other measures (*e.g.*, prohibitions against smoking on school grounds). Because the State's ultimate concern is with conduct, and the State has such a wide range of alternatives to address that conduct, the First Amendment bars it from turning to broad bans on speech. *See 44 Liquormart*, 517 U.S. at 512 (plurality) ("speech restrictions cannot be treated as simply another means that the government may use to achieve its end"). Here, as elsewhere, the constitutionally preferred antidote to disfavored speech is *more speech*.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor To Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General
of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER U.S. SMOKELESS TOBACCO COMPANY

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of its Brief on the Merits, and there are no amendments to that Statement.

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INTRODUCTION

With respect to U.S. Smokeless Tobacco Company ("USSTC") — the only Petitioner challenging the regulations specifically with respect to smokeless tobacco — the Massachusetts Attorney General's brief is more interesting for the issues it avoids than for the points it raises.[1] It avoids substantive discussion of the arguments raised by USSTC; it avoids responding to the deficiencies in the Attorney General's token smokeless tobacco submission detailed by USSTC; and it avoids the simple truth that, as to USSTC, the Attorney General's showing falls far short of the mark set by this Court in matters of speech regulation. Indeed, the level of generality present throughout the Attorney General's brief — as reflected in his repeated use of the term tobacco, as opposed to addressing, with few exceptions, smokeless tobacco — demonstrates further his failure to respond to USSTC's arguments.

1. The Attorney General makes no real effort to respond to USSTC's argument that his token smokeless tobacco submission is patently inadequate as a justification for the abridgement of USSTC's rights under the First Amendment, especially against the backdrop of a "steady and significant decline" in underage smokeless tobacco consumption. Instead, he asserts in a footnote that the non-cigarette Petitioners — which include USSTC — "argue that they should be exempt from Massachusetts' regulation of tobacco advertising." Brief For Respondent ("Resp. Br.") 40 n.21. This is a strawman, for USSTC seeks no such exemption. Rather, it seeks to invalidate the regulations on the grounds that they are unconstitutional content and viewpoint-based restrictions on truthful and nonmisleading speech.

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1. As with its opening Brief, USSTC also relies on the Reply Brief submitted by the Cigarette Petitioners and has limited its presentation here accordingly.

2. This case is not about whether Massachusetts has asserted a substantial interest. It has, and USSTC agrees that reducing underage consumption of smokeless tobacco is an important and shared goal. In our system, however, the question is not solely whether the goal is desirable, but also — and more importantly — whether the *method* chosen to bring about the desired result is permitted by the Constitution. In matters of free speech, it is most often the case, as USSTC submits it is here, that the end does not justify the means. "[W]hatever the legitimate public interest in this area, proper analysis requires us to scrutinize the precise means employed to implement that interest." *Buckley v. Valeo*, 424 U.S. 1, 238 (1976) (Burger, C.J., concurring in part and dissenting in part). Even when it allows for restrictions on speech, the First Amendment requires that government use a scalpel. The Attorney General has used an axe.

3. That others, including *amici*, may share the Attorney General's views about tobacco and advertising lends no assistance to his censorship. As USSTC noted in its opening Brief, the vilification of tobacco companies should herald a call for more protection, not less. Brief For Petitioner U.S. Smokeless Tobacco Company ("USSTC Br.") 15. "The First Amendment protects expression, be it of the popular variety or not. And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2457 (2000) (citations omitted).

The Attorney General's virtual failure to address USSTC and smokeless tobacco speaks volumes about whether he can

meet his constitutional burden of justifying the regulations as to *smokeless tobacco*, under either strict scrutiny or *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). And with respect to the points the Attorney General does make, not one provides genuine support for the blunderbuss regulations with respect to *smokeless tobacco*.[2]

ARGUMENT

THE REGULATIONS CANNOT PASS CONSTITUTIONAL MUSTER WITH RESPECT TO SMOKELESS TOBACCO.

A. The Attorney General Cannot Rely On His Cigarette Submission To Ban Smokeless Tobacco Advertising.

Failing to field any meaningful defense to USSTC's argument that his token smokeless tobacco submission is fatally inadequate, the Attorney General instead implicitly

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2. The Attorney General's contention that USSTC is not asserting a preemption claim is flatly incorrect. Resp. Br. 16 n.7. Rather, as set forth in its opening Brief, USSTC submits that if the regulations are preempted by Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1334 (the "FCLAA"), as to cigarettes, then they also should be preempted by the FCLAA with respect to smokeless tobacco on the grounds that the regulations cannot be severed in their application between the two. USSTC Br. 4 n.5; *see also* Pet. 7 n.6.

In addition, the Attorney General states that this case presents only a facial challenge to the regulations. Resp. Br. 46. However, USSTC's challenge to the regulations is both facial and as applied to USSTC's advertisements. *See* Plaintiff's (USSTC's) Memorandum of Law in Opposition to Motion for Partial Summary Judgment (First Amendment Claims) at 11-12 & n.12 (D. Mass.) (No. 99-11118-WGY).

acknowledges that he is relying on his purported findings as to cigarettes to justify regulating smokeless tobacco advertising. In the Attorney General's words, "[i]t would . . . be *irrationally inconsistent* for Massachusetts to restrict cigarette advertising, but not the advertising for other hazardous tobacco products that are also illegal for sale to minors." Resp. Br. 40 n.21 (emphasis added).[3] Whatever the Attorney General may mean by "*irrationally inconsistent*," this incantation cannot insulate the regulations from USSTC's constitutional challenge as to smokeless tobacco.

To the extent the Attorney General's argument is that he can engage in "regulation by association," it cannot survive First Amendment scrutiny, particularly when, as is the case here, the record demonstrates that the products differ materially with regard to the very issues that are fundamental to the First Amendment inquiry. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963); USSTC Br. 19 (citing, *inter alia*, the fact that while cigarette smoking by minors increased, smokeless tobacco consumption has "declined steadily" and "significantly"). " 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so

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3. The Attorney General cites *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995), in support of his theory that if cigarette advertising is censored, smokeless tobacco advertising likewise must be censored. Resp. Br. 40 n.21. But *Rubin* did not hold that studies and submissions regarding the advertising of one product may be used to support a ban on advertising an entirely different product, particularly when, as is the case here, the record evidence establishes a lack of parity between the products in respects that are critical to the First Amendment inquiry.

closely touching our most precious freedoms.' " *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (quoting *Button*, 371 U.S. at 438).

Thus, it is no answer to USSTC's First Amendment challenge that smokeless tobacco advertising must be suppressed simply because cigarette advertising is suppressed.

B. Strict Scrutiny Applies To The Regulations.

As set forth in USSTC's opening Brief, strict scrutiny is the appropriate standard for analyzing the regulations. USSTC Br. 9-15.

1. Denominating The Regulations As "Locational Restrictions" Does Not Insulate Them From Strict Scrutiny.

The Attorney General argues that the regulations are mere "locational restrictions" on tobacco advertising that should receive only intermediate scrutiny, as is the case with time, place or manner and zoning restrictions. Resp. Br. 15. This assertion, however, crumbles quickly under the weight of a fundamental First Amendment rule: only those restrictions that are *content-neutral* may properly be considered time, place or manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys .... Government regulation of

> expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Id. (alteration in original) (citations omitted) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

There can be no legitimate dispute that the predicate for the Attorney General's "lessened scrutiny" argument is absent because the regulations are not content-neutral. As the Court of Appeals held, the regulations are "plainly content-based." Pet. App. 14a. Indeed, in the very brief in which he argues for the application of a standard that applies to content-neutral regulations, the Attorney General concedes that the regulations restrict speech based on its content. *See, e.g.*, Resp. Br. 31 n. 15 ("Massachusetts regulations . . . make both an appropriate content distinction and restrict only the 'place' of advertising"); *id.* at 31 ("a law focused on the advertising of a specific product — here, tobacco — can be characterized as 'content-based' ").

For the same reason, the Attorney General's reliance on zoning cases, such as *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), is misplaced, as made clear by this Court's decision last term in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

> Our zoning cases, on the other hand, are irrelevant to the question here. We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of

> protected speech. The statute now before us burdens speech because of its content; it must receive strict scrutiny.

Playboy Entm't, 529 U.S. at 815 (citations omitted). Because the regulations are plainly content-based, and directed at the alleged primary effects of smokeless tobacco advertising, they cannot be analyzed under either a time, place or manner or zoning standard.

2. The State's Legitimate Interest In Protecting Minors Does Not Create A Constitutional Exemption For The Suppression Of Protected Speech Directed To Adults.

The Attorney General states that the regulations are permissibly content-based because they are designed to protect minors. Resp. Br. 31. His attempt to justify the regulations on this basis, however, runs afoul of this Court's repeated holdings that an interest in protecting minors does not create an exemption from the strictures of the First Amendment. *E.g., Playboy Entm't*, 529 U.S. at 811-15; *see also* USSTC Br. 11. "And if the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness." Laurence H. Tribe, *American Constitutional Law* § 12-2, at 790 (2d ed. 1988).

3. The Regulations Are Not Viewpoint-Neutral.

As set forth in USSTC's Brief, the regulations ban speech that promotes smokeless tobacco brands to adult consumers, but permit the Commonwealth to utter its anti-tobacco messages

at will. USSTC Br. 13-15. This is the essence of viewpoint discrimination. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). "[I]f the constitutional guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . .' ." Tribe, *supra*, § 12-2, at 790 (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)).

The Attorney General argues that the regulations do not restrict viewpoint, and should receive intermediate scrutiny, because "Massachusetts has a neutral basis for its regulation (support of its tobacco sales law), which forecloses any argument that 'official suppression of ideas is afoot.' " Resp. Br. 33. This claim of viewpoint neutrality simply cannot be reconciled with the regulations. For example, they suppress USSTC's particular viewpoint that its smokeless tobacco products are for sale to adults only, as captured in the following message included in all of USSTC's advertisements: "U.S. Tobacco Reminds You – Smokeless Tobacco – Not For Sale To Minors." Cir. JA 3756-62. Thus, even though USSTC's advertising expressly *supports* Massachusetts' prohibition on smokeless tobacco sales to minors, it is nonetheless effectively censored by the regulations. This demonstrates that the Attorney General is attempting to silence *USSTC*, an effort that clearly violates the First Amendment. *Playboy Entm't*, 529 U.S. at 812 ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999) ("[D]ecisions that select among speakers conveying virtually

identical messages are in serious tension with the principles undergirding the First Amendment.").[4]

4. The Blunderbuss Approach Taken By The Attorney General Demonstrates The Need For Strict Scrutiny.

The ease with which the Attorney General attempts to sweep aside USSTC's speech, without making any real showing — or even acknowledging the need for one — is a reminder both of the temptation of government officials to try to silence those with whom they disagree, and the need for courts to strictly scrutinize such efforts. USSTC Br. 10-11. The words of Justice Holmes ring true here, and counsel the application of strict scrutiny to such attempts at censorship. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.").[5]

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4. USSTC's inclusion in its advertising of this viewpoint on a matter of public concern does not affect its constitutionally-protected status. "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16.

5. The indiscriminate nature of the Attorney General's approach is highlighted by his labeling of all tobacco advertisements covered by the regulations as "unfair or deceptive." 940 C.M.R. § 21.04(5). Such labeling avoids the "precision of regulation" required by the First Amendment. *See supra*, section A; *see, e.g.*, *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 621-22 (1996) ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot

(Cont'd)

For the reasons set forth herein, and in USSTC's opening Brief, strict scrutiny should be applied, and the regulations should be invalidated.

C. The Regulations Fail To Meet The *Central Hudson* Standard.

USSTC submits that even if *Central Hudson* is the appropriate standard, the regulations fail as to smokeless tobacco. USSTC Br. 16-25. Nothing in the Attorney General's brief or his Lodging alters, or even meaningfully addresses, this conclusion.

1. The Attorney General's Lodging Does Not Resuscitate The Regulations With Respect To Smokeless Tobacco.

As an initial matter, the fact that the Attorney General believed it necessary to lodge extra-record materials with the Court, and cite them in his brief, only highlights the

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(Cont'd)
(for constitutional purposes) make it one."); *Button*, 371 U.S. at 429 (government "cannot foreclose the exercise of constitutional rights by mere labels"); *Edwards v. South Carolina*, 372 U.S. 229, 235-38 (1963) (state may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

In any event, notwithstanding his protestation to the contrary (Resp. Br. 35 n.17), the Attorney General very clearly conceded below, for purposes of summary judgment, the truthful and nonmisleading nature of USSTC's speech concerning a lawful activity (Pet. App. 17a), and maintained that whether USSTC's advertisements are unfair or deceptive is not relevant to the subject matter of this litigation (Cir. JA 549-52).

inadequacy of the record as to smokeless tobacco.[6] Indeed, the Attorney General barely mentions smokeless tobacco in his brief, and when he does he relies as much on his Lodging as on the record below. Even if this Court decides that such extra-record materials were properly placed before it, the materials do not bolster the record as to *smokeless tobacco*.

2. The Attorney General Continues To Ignore The Numerous Alternatives To The Regulations Proposed By USSTC.

Incredibly, the Attorney General argues that there is no alternative to prohibiting the display of tobacco advertising, Resp. Br. 49, and that the only alternative measure to the regulations offered by the Petitioners is criminalization of underage tobacco use. Resp. Br. 48 n.28. Once again, he

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6. While USSTC does not concede that the Lodging is appropriate, it relates, like the Attorney General's submission below, primarily to cigarettes. As to smokeless tobacco, the Lodging contains excerpts of the 2000 Surgeon General report, which includes an allegation that smokeless tobacco usage trends in the 1970s and early 1980s can be attributed to purported marketing activities. Lodging of the Respondent ("Ldg.") 5-6. This is the same allegation that the Attorney General raised below, relying on certain conclusory statements made by the Food and Drug Administration in 1996 in connection with its vacated rule concerning tobacco products. USSTC Br. 21. As USSTC stated in its opening Brief, this allegation relates to purported decades-old marketing from (according to the Attorney General) the late 1960s (Resp. Br. 39 n.19), and is irrelevant to this case. USSTC Br. 21-22 & n.17. In addition, elsewhere in the 2000 Surgeon General report, in a portion the Attorney General chose not to excerpt for the Court in his Lodging, these alleged smokeless tobacco usage trends were attributed at least in part to excise tax differentials that existed at the time. *Reducing Tobacco Use, A Report of the Surgeon General* 336 (2000).

ignores USSTC's arguments. In its opening Brief, USSTC cited numerous available alternatives to the regulations, including a statewide licensing scheme, which the Attorney General's own 1994 survey concluded could "drastically reduce the sale of tobacco products to minors"; electronic age verification, as implemented by several other states; and case by case enforcement actions directed at advertising that is actually unfair or deceptive pursuant to the Attorney General's existing authority under Massachusetts General Laws chapter 93A, section 4. USSTC Br. 23-24.[7]

With respect to smokeless tobacco, the regulations do not directly and materially advance the asserted government interest and, as USSTC's proposed alternatives demonstrate, the regulations are far more extensive than necessary.

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7. The Attorney General briefly argues that self-service displays are not protected by the First Amendment. Resp. Br. 47 n.26. Such displays, however, declare the availability and freshness of USSTC's brands for a particular price and propose a transaction with the adult consumer, entitling them to protection. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) ("the prohibition of any 'advertisement or *display*' of contraceptives is unconstitutional") (emphasis added). Self-service displays allow the price, freshness, or brand-conscious consumer to examine the package of each brand available and any price sticker or other information (such as freshness date) affixed to such package. USSTC Br. 6 n.6.

CONCLUSION

For the foregoing reasons, and those set forth in its opening Brief, Petitioner USSTC respectfully requests that this Court reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Nos. 00-596 and 00-597

In the Supreme Court of the United States

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v.

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the advertising of tobacco products near a school or playground are preempted by the Federal Cigarette Labeling and Advertising Act.

2. Whether such regulations violate the First Amendment.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the question whether state regulations that restrict the advertising of tobacco products near a school or playground are preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. 1331 *et seq.* The Attorney General is responsible for enforcing FCLAA, 15 U.S.C. 1339. In addition, FCLAA preserves the authority of the Federal Trade Commission (FTC) with respect to unfair or deceptive advertising of cigarettes, see 15 U.S.C. 1336, and it requires the Secretary of Health and Human Services (HHS) and the FTC to submit annual reports to Congress concerning the health consequences of smoking and current practices of cigarette advertising, see 15 U.S.C. 1337. The

Secretary of HHS also administers a program to inform the public about any dangers to human health presented by smoking and to maintain liaison with state and local agencies in those efforts. See 15 U.S.C. 1341. Pursuant to 42 U.S.C. 300x-26, the Secretary also makes block grants for prevention and treatment of substance abuse that are conditioned on the States' taking appropriate steps to reduce the availability of tobacco products to minors.

The United States also has an interest in the question whether restrictions on the advertising of tobacco products near a school or playground violate the First Amendment. Federal law places important restrictions on commercial speech that threatens public health and safety, including commercial speech concerning tobacco products. 15 U.S.C. 1335 (unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission); 15 U.S.C. 1336 (preserving FTC's authority over unfair or deceptive practices in cigarette advertising); 21 U.S.C. 343(r) (1994 & Supp. IV 1998) (authorizing Food and Drug Administration (FDA) to restrict labeling claims about nutrients).

STATEMENT

1. The Attorney General of Massachusetts has promulgated regulations that restrict advertising of tobacco products near a school or playground. Specifically, the regulations prohibit "[o]utdoor advertising [of tobacco products], including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." Mass. Regs. Code tit. 940, § 21.04(5)(a) (2001). The regulations also prohibit interior store advertising of cigarettes or smokeless tobacco products within the 1000 foot zones unless the signs are placed more than five

feet from the floor or the store is an adult-only establishment. § 21.04(5)(b). The Attorney General has declared each of those practices to be "unfair or deceptive acts or practices" within the meaning of chapter 93A, § 2(a) of the Massachusetts General Laws because they induce children to use tobacco products. Mass. Regs. Code tit. 940, § 21.01 (2001).[1]

Tobacco manufacturers (petitioners) filed suit against the Attorney General of Massachusetts (the State), alleging that the State's outdoor and interior store advertising restrictions are preempted by FCLAA and violate the First Amendment. Pet. App. 6a. FCLAA's preemption provision specifies that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. 1334(b).

The district court held that the State's advertising restrictions are not preempted by FCLAA. The court reasoned that the regulations are not "based on smoking and health" within the meaning of FCLAA's preemption provision because they are based on the location of the advertising and not on what the advertising communicates about the relationship between smoking and health. Pet. App. 52a-57a. The district court also held that the State's outdoor advertising restriction does not violate the First Amendment. Applying the analysis set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the district court determined that the restriction directly

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[1] The regulations permit a retailer to "place one sign no larger than 576 square inches and containing only black text on a white background stating 'Tobacco Products Sold Here' on the outside or visible from the outside of each location where such products are offered for sale." Mass. Regs. Code tit. 940, § 21.04(6) (2001). The district court invalidated that provision. Pet. App. 57a. No appeal was taken from that aspect of the district court's ruling, and the validity of that provision is not at issue here.

serves the State's substantial interest in preventing underage tobacco use and is not more extensive than necessary. Pet. App. 68a-83a. The court invalidated the interior store advertising restriction, finding it more extensive than necessary. *Id.* at 82a-83a.

The court of appeals affirmed in part and reversed in part. Pet. App. 1a-45a. The court held that the advertising restrictions are not preempted by FCLAA because they are not prohibitions "with respect to * * * advertising" within the meaning of Section 1334. *Id.* at 9a-13a. The court reasoned that restrictions on advertising location "do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress," *id.* at 12a-13a, and that interpreting the phrase "with respect to * * * advertising" to encompass such restrictions would amount to "uncritical literalism," *id.* at 13a n.7.

Applying the *Central Hudson* analysis, the court of appeals also held that the State's advertising restrictions do not violate the First Amendment. Pet. App. 14a-35a. The court concluded that the State has substantial interests in preventing unlawful sales of tobacco to minors and in protecting the health of minors from the adverse effects of tobacco use. *Id.* at 18a. The court also determined that the State had shown that there is a direct link between tobacco advertising and underage tobacco use and that limits on advertising near schools and playgrounds would serve the State's interests in curbing underage use to a material degree. *Id.* at 21a-29a. Finally, the court concluded that the State's restrictions are not more extensive than necessary, *id.* at 29a-35a, emphasizing that the restrictions are limited to those areas where children are most likely to be affected by tobacco advertising, *id.* at 30a-31a.

SUMMARY OF ARGUMENT

I. The purpose of Congress is the ultimate touchstone of preemption. Preemption analysis under FCLAA nonetheless

is with an assumption that Congress did not intend to preempt the historic police powers of the States. Two fields of traditional state authority are implicated here—the State's authority to regulate the location of advertising and its authority to protect the health and welfare of children from an addictive and dangerous product.

FCLAA does not reflect any purpose by Congress to preempt advertising location restrictions like those at issue here. FCLAA's preemption provision reaches only requirements or prohibitions that are "based on smoking and health." The restrictions at issue here are "based on" the location of the advertising; they are not "based on smoking and health." Congress used the phrase "based on smoking and health" to limit the scope of preemption to regulations that require or prevent the advertisement of a message concerning the relationship between smoking and health. Because the restrictions at issue here apply without regard to the message of the advertising, they are not preempted.

That conclusion is especially evident when FCLAA is viewed as a whole. When Congress amended the preemption provision to its current form, it both reestablished federal warning requirements for cigarette labels and preserved the FTC's authority to require warnings in advertising. The preemption provision is best understood as displacing state regulations that could interfere with that federal warning program—such as those that require or prohibit health messages in labeling or advertising. State restrictions on the location of advertising, however, do not interfere with federal warning requirements. They are therefore not preempted.

FCLAA's declaration of purpose confirms that Congress's intent was to establish uniform health warning requirements and to displace conflicting and diverse state requirements in that area. Congress expressed no intent to displace a State's traditional authority to decide where advertising may be located within its borders.

II. The State's restrictions on advertising near schools and playgrounds satisfy the established standards for evaluating the constitutionality of restrictions on commercial speech. See *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). The State's interests in preventing unlawful distribution of tobacco products to minors and protecting minors from the health consequences of smoking are compelling. The nicotine in tobacco is extraordinarily addictive, and one out of three children who becomes addicted will eventually die from a tobacco-related disease.

The State's restrictions on advertising are also directly and materially related to preventing underage tobacco use. Evidence shows that tobacco advertising (1) creates an environment of "friendly familiarity" in which children view smoking as pervasive and acceptable, (2) seduces vulnerable children through techniques that associate smoking with excitement, glamour, and independence, and (3) leads children who lack maturity in judgment to underestimate the addictive power and health risks of tobacco products.

By placing restrictions on advertising within 1000 feet of schools and playgrounds, the State has carefully tailored its restrictions to the areas where children are most likely to be repeatedly and unavoidably exposed to tobacco advertising. The State's restrictions also leave petitioners with ample opportunities to convey information about their products to adults, such as through outdoor advertising outside the school and playground zones, and through newspapers, magazines, direct mail, and personal solicitation. More aggressive enforcement of the laws that prevent sale of tobacco products to children can only accomplish so much. Advertising restrictions are necessary to complement enforcement efforts because they attack a dimension of the problem that enforcement efforts do not address—the demand for tobacco that advertising creates and nourishes in minors.

The Court should reject petitioners' proposal to apply strict scrutiny to what they assert are content or viewpoint based restrictions on commercial speech. *Central Hudson*'s middle-tier scrutiny strikes the appropriate balance between a seller's interest in proposing a commercial transaction and the State's right to regulate speech that is intimately bound up with economic activity. Moreover, the restrictions at issue here are directly related to preservation of a fair bargaining process. The State justifiably views any bargain between tobacco manufacturers and children as inherently unfair, both because the State has made the sale of tobacco products to children unlawful, and because so many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence, and to appreciate the addictive power and health risks of tobacco products.

ARGUMENT

I. THE STATE'S RESTRICTIONS ON ADVERTISING NEAR SCHOOLS AND PLAYGROUNDS ARE NOT PREEMPTED BY FCLAA

FCLAA's preemption provision specifies that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. 1334(b). As the courts below concluded, that provision does not preempt state regulations that restrict the location —as distinguished from the content—of advertising.

A. When this Court considered the scope of FCLAA's preemption provision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), it stressed that "[t]he purpose of Congress is the ultimate touchstone." *Id.* at 518 (internal quotation and citation omitted). But the Court "start[ed] with the assumption," that because Congress had legislated "in a field which the States have traditionally occupied," "the historic police

powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see 505 U.S. at 516 (quoting *Rice*); see also *Medtronic* v. *Lohr*, 518 U.S. 470, 485 (1996). Two fields of traditional state authority are directly implicated here—regulating the location of advertising and the protection of the health and welfare of children.

This Court recognized both of those traditional state interests in *Packer Corp.* v. *Utah*, 285 U.S. 105 (1932). In that case, the Court rejected an equal protection challenge to a state law that prohibited billboard advertising of tobacco products, but did not prohibit tobacco advertising in newspapers, magazines, or periodicals. The Court explained that it had been the State's "persistent policy" to prevent the use of tobacco by minors and that the restriction on billboard advertising of tobacco products furthered that policy. *Id.* at 108-109. The Court also noted that the message on billboards, unlike that in newspapers or periodicals, is "thrust upon" young people as well as adults with "all the arts and devices that skill can produce," "without the exercise of choice or volition" on the part of the viewer. *Id.* at 110. The Court also rejected a Commerce Clause challenge to the law, explaining that the restriction on billboard advertising fell within the scope of the State's police power because it dealt with a form of advertising that is "essentially local." *Id.* at 112.

Against that background, preemption analysis must start with the assumption that, in enacting FCLAA in 1965 and amending it in 1970, Congress did not intend to displace state advertising restrictions like those at issue here. Like the Utah billboard law upheld in *Packer Corp.*, the regulations at issue here restrict only the location of tobacco advertising within the State, and therefore address an "essentially local" problem that does not implicate the purpose of FCLAA to protect national commerce from a diver-

sity of state laws concerning the content of cigarette advertising with respect to smoking and health. See pp. 13-14, *infra*. Furthermore, like the billboard law in *Packer Corp.*, the Massachusetts regulations restrict advertising in order to help curb underage tobacco use.

FCLAA does not reflect any purpose by Congress to preempt such advertising location restrictions. That conclusion follows from a close examination of the text of the FCLAA preemption provision itself and from FCLAA's purpose to specify the text of required health warnings in cigarette labels and advertising.

B. FCLAA's preemption provision reaches only prohibitions or requirements that are "based on smoking and health." The restrictions at issue here are "based on" the location of the advertising; they are not "based on smoking and health" as those terms are used in 15 U.S.C. 1334(b). See *Penn Adver. of Baltimore, Inc.* v. *Mayor & City Council*, 63 F.3d 1318 (4th Cir. 1995), vacated and remanded on other grounds, 518 U.S. 1030, readopted and modified on remand, 101 F.3d 332 (4th Cir. 1996), cert. denied, 520 U.S. 1204 (1997).

In barring any "requirement or prohibition based on smoking and health," Section 1334(b) bars the States from imposing any requirement or prohibition that *operates on the basis of* smoking and health. The Massachusetts regulations challenged here, by contrast, operate on the basis of, and with specific reference to, the location of the advertising, not its content. The regulations neither require petitioners to mention, nor prohibit petitioners from mentioning, any relationship between smoking or health in their advertising. Indeed, they do not even impose any duty on petitioners that requires them to consider any relationship between smoking and health in order to comply. In short, the Massachusetts regulations operate *irrespective* of any relationship between smoking and health.

Petitioners argued below (see Pet. App. 53a) that the State's restrictions are "based on smoking and health" because concerns about the health consequences of smoking motivated the State to adopt them. The text of Section 1334(b) substantially undermines the notion that preemption turns on the State's motive in imposing the restrictions, rather than on the character of the restriction. Again, Section 1334(b) provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are properly labeled under FCLAA. It is clear from the structure of the sentence that the phrase "based on smoking and health" modifies "requirement or prohibition," not "imposed." The phrase is therefore most naturally read as referring to the objective character of the requirement or prohibition itself, not the subjective reasons of the State for imposing it. If Congress had intended to require an inquiry into motive, it would have located the phrase referring to smoking and health so that it modified "imposed" rather than "requirement or prohibition," and probably would have used words other than "based upon" (such as "because of" or "on account of").[2]

By contrast, the wording Congress chose shows that it intended an objective inquiry, rather than a subjective one, and that the relevant question for purposes of preemption is whether the requirement or prohibition is itself written in terms of smoking and health. Thus, as the district court concluded, Section 1334(b) preempts any law that either "specifically requires or prevents the advertisement of a

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[2] For example, Congress in that event could have drafted Section 1334(b) to read: "No requirement or prohibition shall be imposed under State law, because of any relationship between smoking and health, with respect to the advertising or promotion of cigarettes." Compare *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979) (purposeful discrimination shown only if State acted "because of," not "in spite of," adverse effects on an identifiable group).

message concerning the relationship between smoking and health." Pet. App. 57a. It does not reach restrictions that regulate the location of advertising.

Petitioners' suggested motivational interpretation also suffers from additional flaws. First, there is no reason to believe that Congress regarded state action taken because of concerns about the health consequences of smoking as inherently suspect, and designed Section 1334(b) to root out state action undertaken for that prohibited purpose in the same manner as a prohibition against state actions having a racially discriminatory purpose. To the contrary, Congress sought to encourage States to exercise their police powers to address the central public policy issues raised by the relationship between smoking and health. See p. 16, *infra*; see also 15 U.S.C. 1341(a)(3) and (5) (Secretary to maintain liaison with States respecting activities relating to smoking and health); 42 U.S.C. 300x-26 (block grants conditioned on States reducing availability of tobacco to minors).

Second, almost any requirement or prohibition that a State would be likely to impose specifically "with respect to the advertising or promotion of * * * cigarettes" would have as its underlying motivation a concern about the health consequences of smoking. Interpreting "based on smoking and health" to refer to the State's underlying motivation would therefore deprive that phrase of any significant limiting force. This Court has cautioned against interpreting a preemption provision in a manner that fails to give significant force to "words of limitation." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Petitioners' proposed interpretation suffers from that vice.[3]

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[3] Petitioners' interpretation is equally incongruous if we assume, arguendo, that some state or local governments would adopt particular restrictions on cigarette advertising for reasons other than a concern about the relationship between smoking and health. In that event, a restriction that was adopted in identical form by a number of state or local

Petitioners' contrary interpretation also would lead to startling consequences. Under petitioners' interpretation, a State could not bar tobacco advertising at school entrances or at little league fields. Congress did not intend such an unusual result.

C. The conclusion that location restrictions are not preempted is especially evident when FCLAA is viewed "as a whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). The core of FCLAA is 15 U.S.C. 1333's requirement that cigarette labels and advertising must carry specific warnings about the dangers of smoking. When Congress amended the preemption provision to its current form, it had not yet extended the federal warning requirements to advertising. It had, however, preserved FTC's authority to require warnings in advertising in order to prevent unfair and deceptive advertising practices. *Cipollone*, 505 U.S. at 514-515 (1992).[4] Having established federal warning requirements in Section 1333 for cigarette labels and having preserved FTC's authority to require federal warnings in advertising, Congress amended Section 1334 to preempt state regulations that could interfere with those federal warning requirements. State law restrictions that

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governments and applied irrespective of the presence or absence of any message in the advertising concerning the relationship between smoking and health would be valid in some of those jurisdictions and invalid in others, depending upon the underlying motivation of each governmental entity. There is no reason to believe that Congress intended such a cumbersome inquiry and uneven result under a preemption provision that was designed to ensure national uniformity in the narrow field in which it operates. See pp. 13-14, *infra*.

[4] Congress amended FCLAA in 1984 to prescribe specific warnings in advertising, including billboard advertising. See Pub. L. No. 98-474, § 4(a), 98 Stat. 2201; 15 U.S.C. 1333(a)(2) and (3), (b)(2) and (3). Those same amendments also revised the warnings on cigarette packages, replacing a single warning with four warnings to appear on a rotating basis. See 15 U.S.C. 1333(a)(1).

either require or prohibit health messages in labeling or advertising meet that description.

Congress did not, however, establish any federal requirements on where billboard and other advertising could be located within a State. Its failure to do so is not surprising. Deciding where advertising may be located within a State is a peculiarly local function. See p. 8, *supra*. Having failed to establish any federal requirements on the subject, it is most unlikely that Congress intended through a general preemption provision to supersede the State's traditional authority in that area. Because state *location* restrictions could not interfere with federal *warning* requirements, Congress had no reason to preempt them. And because ordinary field and conflict preemption principles thus would not suggest that location restrictions are invalid, there is no reason why Section 1334(b) should be construed to require that surprising result. See *Medtronic*, 518 U.S. at 500 (construing a general preemption provision to apply only "where a particular state requirement threatens to interfere with a specific federal interest"); See also *California Div. of Labor Standards Enforcement* v. *Dillingham Constr.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (ERISA's preemption provision should be construed to embody ordinary field and conflict preemption principles); accord *Egelhoff* v. *Egelhoff*, No. 99-1529 (Mar. 21, 2001), slip op. 1 (Scalia, J., concurring); *id.* at 1 (Breyer, J., dissenting).

D. FCLAA's "declaration of policy and purpose" in 15 U.S.C. 1331 confirms that Congress intended to preempt only state restrictions that would create a lack of uniformity in the health messages required or prohibited in labeling and advertising. Section 1331 begins by stating that Congress's purpose in FCLAA is "to establish a comprehensive Federal Program to deal with cigarette labeling and *advertising with respect to any relationship between smoking and health.*" 15 U.S.C. 1331 (emphasis added). It then states that the comprehensive program that FCLAA establishes is one

whereby "the public may be adequately *informed* about any adverse health effects of cigarette smoking by *inclusion of warning notices* on each package of cigarettes and in each advertisement of cigarettes." 15 U.S.C. 1331(1) (emphasis added). Those statutory declarations demonstrate that Congress's purpose was to establish uniform federal requirements concerning statements in either labeling or advertising about the adverse health effects of smoking. There is no indication in those declarations that Congress had the far broader intent to prevent state and local governments from exercising their traditional authority to determine where tobacco advertising may be placed.

Subsection (2) similarly expresses Congress's purpose that the comprehensive federal program it established is one whereby "commerce and the national economy may be * * * not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to *any relationship between smoking and health*." 15 U.S.C. 1331(2)(B) (emphasis added). That declaration confirms that Congress viewed as a threat to the federal program only the potential for diversity in state regulation that addresses "any relationship between smoking and health"—*i.e.*, health message regulations. Diverse state requirements on where tobacco advertising may be located do not pose such a threat.

Indeed, "[d]ivergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them." *Greater N.Y. Metro. Food Council, Inc.* v. *Giuliani*, 195 F.3d 100, 109 (2d Cir. 1999), cert. denied, 529 U.S. 1066 (2000). Those generally applicable zoning restrictions are not even arguably preempted by Section 1334(b). Thus, regardless of the outcome in this case, a cigarette advertiser would still be required to "ascertain where it can permissibly advertise in light of diverse local zoning ordinances." *Ibid.* In terms of the

policies Congress sought to advance, there is no reason to treat tobacco-specific location restrictions any differently.

E. The evolution of FCLAA's preemption provision also shows that it encompasses only state laws that affect the health messages contained in cigarette advertising. When originally enacted in 1965, Section 1334(b) provided:

> No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

FCLAA, Pub. L. No. 89-92, § 5(b), 79 Stat. 283. As explained by the plurality in *Cipollone*, 505 U.S. at 518, the phrase "statement relating to smoking and health" "referred to the sort of warning provided for in [Section 1331] which set forth verbatim the warning Congress determined to be appropriate." That language therefore "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements." *Id.* at 519-520. Thus, the original version of Section 1334(b) did not preempt state regulations that affect only the placement of advertisements.

Congress amended Section 1334(b) in 1970, Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2m, 84 Stat. 88, and that amendment expanded the scope of the preemption provision in certain respects. As amended, Section 1334(b) now encompasses "prohibitions" as well as "requirements," and it encompasses regulations "with respect to advertising," not just regulations concerning what is "in the advertising." *Cipollone*, 505 U.S. at 520 (plurality opinion).[5] The amendment did not, however, substantively change the smoking-and-health nexus of Section 1334(b). As noted in the plurality opinion in *Cipollone*, "the phrase 'relating to

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[5] See *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68, 73-75 (2d Cir. 1994) (state law requiring a company that advertises cigarettes to make separate public service announcements concerning health effects of smoking is "with respect to" advertising, and therefore preempted).

smoking and health' * * * was essentially unchanged by the [amendment]." *Id.* at 529. Thus, like the original version of Section 1334(b), the amended version encompasses requirements that regulate the health messages in tobacco advertising, not ones that restrict advertising location.

Nothing in the legislative history of the amendments suggests that Congress intended to alter the preemption provision's health-message focus. The Senate Report states that the amendment merely "clarified" the original version of the preemption provision. S. Rep. No. 566, 91st Cong., 2d Sess. 12 (1969). The Senate Report further states that "[t]he state preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased* to preempt only state action based on smoking and health." *Ibid.* (emphasis added). And the Report makes clear that the amendment "*would in no way affect the power of any state or political subdivision of any state with respect to* the taxation or *the sale of cigarettes to minors*, or the prohibition of smoking in public buildings, *or similar police regulations.*" *Ibid.* (emphasis added). Those statements support the authority of Massachusetts to restrict the location of outdoor advertising in order to help prevent the unlawful sale of cigarettes to minors. The Report also states that the preemption provision was intended to "avoid the chaos created by a multiplicity of *conflicting* [state or local] regulations," *id.* at 12, something that could not occur with respect to location restrictions. Several members of the Conference Committee described the preemption provision in comparably narrow terms.[6]

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[6] Representative Staggers stated that the bill "contains the preemption applicable to states and their political subdivisions in recognition of the fact that the labeling, advertising, promotion, and sale of cigarettes insofar as they are related to smoking and health are matters of national concern," and "makes clear that in order to make the legislation effective, States and their local divisions are not to interfere with the scheme of

F. The plurality's conclusion in *Cipollone* that common law claims based on fraudulent misrepresentation in advertising are not "based on smoking and health" is also instructive here. The plurality explained that the "central inquiry" in determining whether a common law claim is preempted is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health' * * *, giving that clause a fair but narrow reading." 505 U.S. at 523-524. Because the petitioner alleged that tobacco companies had made false representations of material fact or concealed material facts concerning the health consequences of smoking (see *id.* at 510, 528), his claims of fraudulent misrepresentation could have been viewed as falling within the text of Section 1334(b), at least if broadly construed. The plurality concluded, however, that those claims were not preempted because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation —the duty not to deceive." *Id.* at 528-529. The Court found that interpretation of Section 1334(b) appropriate for a number of reasons: (1) there was no evidence that Congress intended to insulate cigarette manufacturers from longstanding rules governing fraud; (2) the legislative history showed that Congress intended for the terms "based on smoking and health" to be construed narrowly and not to reach traditional exercises of the police power; (3) state law prohibitions against fraud do not create "diverse, nonuniform, and confusing" standards; and (4) holding the claim preempted

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regulation provided for in the legislation." 116 Cong. Rec. 7920 (1970). Representative Satterfield similarly described the matters of national concern and explained that "state and local jurisdictions are not by regulation or prohibition to expand, duplicate, or change Federal regulation in any way or to reduce[] the legal or practical effectiveness of the warning statement imposed by section 4, or to otherwise interfere with this legislation." *Id.* at 7921; cf. Pet. App. 55a n.9 (discussing 116 Cong. Rec. 6640 (1970) (Sen. Magnuson)).

would conflict with the background presumption against preemption. *Id.* at 529 & nn.26, 27; see also *id.* at 530.

A similar analysis applies here. The Massachusetts regulations do not impose on petitioners any duties "based on smoking and health." Rather, they impose duties based on the location of the advertising.[7]

II. THE STATE'S ADVERTISING RESTRICTIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioners argue that the State's restrictions on advertising near schools or playgrounds violate the First Amendment. Those restrictions, however, satisfy the established standards for judging the validity of restrictions on commercial speech. And petitioners have not offered a persuasive justification for departing from those standards here.

A. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), sets forth the standards for evaluating the constitutionality of restrictions on commercial speech. Speech that concerns an unlawful activity or that is misleading is not protected by the First Amendment. To justify a restriction on speech that concerns a lawful activity and is not misleading, the State must show that (1) its asserted interests are substantial; (2) the restriction directly advances the interests; and (3) the restriction is not more extensive than is necessary to serve those interests. *Id.* at 566.

For purposes of its summary judgment motion, the State assumed arguendo that the speech at issue here concerns a lawful activity and is not misleading. To succeed on its summary judgment motion, the State was therefore required to

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[7] For many of the same reasons we have set forth, the court of appeals in this case held that the State's restrictions are not "with respect to * * * advertising" within the meaning of Section 1334(b). Pet. App. 9a-13a. While we share the court's view that the State's restrictions are not preempted, we believe that conclusion is more appropriately grounded in the preemption provision's "based on smoking and health" limitation.

satisfy its burden of justification on the other three inquiries. As we now show, the State satisfied its burden.

B. The interests asserted by the State are preventing unlawful sale and distribution of tobacco products to minors and protecting minors from the health consequences of tobacco use. Those interests are compelling. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) (government has "compelling interest in protecting the physical and psychological well-being of minors"). Our perspective on that issue is shaped by the decades of study and evaluation by the Department of Health and Human Services, including the Surgeon General. Those consequences were most comprehensively explained by FDA, which, after the most extensive rulemaking in its history, found that petitioners manufacture a product that is both highly addictive and dangerous, particularly for children. In *Brown & Williamson*, *supra*, the Court held that FDA lacks authority to regulate tobacco products. It did not, however, call into question FDA's core findings. 529 U.S. at 125, 127-128, 134-135. To the contrary, the Court concluded that "[t]he agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Id.* at 161.

The agency's findings are worth repeating. FDA found that there is a consensus in the scientific community that the nicotine in tobacco is extraordinarily addictive. 61 Fed. Reg. 44,629 (1996). As many as 92% of all smokers are addicted to cigarettes. *Id.* at 44,730. Tobacco use is also the single leading cause of preventable death in the United States. *Id.* at 44,398. More than 400,000 deaths result each year from tobacco-related illnesses such as cancer, respiratory illnesses, and heart disease. *Ibid.* In addition, tobacco use is a "pediatric disease," *id.* at 44,421, because most people who use tobacco as adults began smoking regularly during childhood, *id.* at 44,399. The average age at which children try

their first cigarette is $14^{1/2}$, and 82% of adults who have ever smoked had their first cigarette before age 18. *Id.* at 45,239. If adolescents can be kept tobacco-free, few will start using tobacco as adults. Every year, however, approximately one million children begin to smoke, *id.* at 44,398, 44,568, and one of every three who become regular smokers will eventually die from a tobacco-related disease, *id.* at 44,399. The State therefore has vital interests in preventing children from becoming addicted to the dangerous product that petitioners manufacture.

C. The State's restrictions on advertising near schools and playgrounds are also "direct[ly] and material[ly]" related to its interests in preventing underage tobacco use. See *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993). As the court of appeals noted, the State submitted "[n]early two thousand pages of * * * reports and surveys by governmental, scientific, and academic entities" to support its conclusions that advertising significantly contributes to underage tobacco use and that the State's advertising restrictions will alleviate that harm to a material degree. Pet. App. 27a. The evidence compiled by FDA provides firm support for the State's conclusions.

FDA found that, in 1993 alone, the tobacco industry spent more than $6.1 billion to promote and advertise its products and that mass marketing of that magnitude creates an environment of "friendly familiarity" in which children view smoking as acceptable. 61 Fed. Reg. at 44,475. FDA also found that the tobacco industry uses advertising techniques that "associate the use of tobacco products with excitement, glamour, and independence," and that children are particularly "vulnerable" to those techniques. *Id.* at 44,398. FDA further found that "the pervasiveness and imagery used in industry advertising and promotional programs often obscure adolescent perceptions of the significance of the associated health risks and the strength of the addictive power of tobacco products." *Id.* at 44,571. FDA therefore

concluded that advertising plays a material role in the decision of children to smoke. *Id.* at 44,489.

FDA cited abundant evidence to support its findings. For example, the Surgeon General and the Institute of Medicine both concluded that advertising affects tobacco consumption by altering perceptions about the pervasiveness and social benefits of smoking. 61 Fed. Reg. at 44,487-44,489. The American Psychological Association similarly determined that tobacco advertisers use images that appeal to children's need to belong and to appear more grown up, a technique that effectively breaks down resistance to tobacco use. *Id.* at 44,488-44,489.

In addition, studies show that advertising plays a role in leading children to overestimate the prevalence of smoking and that those misperceptions are related to smoking initiation. 61 Fed. Reg. at 44,476. Studies also show that children who smoke are much more likely to recall tobacco advertising and that exposure to advertising is positively correlated with smoking behavior and intention to smoke. *Id.* at 44,475-44,476. Significantly, of the children who smoke, 86% use the three most heavily advertised brands, while adults more commonly use brands that are not advertised. *Id.* at 44,482.

The industry has acknowledged in its written documents that young people are a crucial segment of the tobacco market. 61 Fed. Reg. at 44,489. The reason is apparent. As explained by the Surgeon General, "[s]ince most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases." J.A. 192. Internal RJR documents establish that there was a company policy to develop brands that would appeal to pre-smokers and learners aged 14-18. 61 Fed. Reg. at 44,480. RJR subsequently developed the Joe Camel cartoon campaign, and that campaign significantly affected youth smok-

ing rates. *Id.* at 44,476. Similarly, a marketing campaign directed to women resulted in a significant increase in smoking by young girls. *Ibid.*

It is also a matter of common sense that the expenditure of $6.1 billion on advertising and promotion would increase consumption of tobacco. The FDA quoted one "well-known advertising executive," who commented: "'I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every other product, somehow miraculously fails to work for tobacco products.'" 61 Fed. Reg. at 44,494. Not surprisingly, studies show that when advertising restrictions have been enforced in other countries, tobacco use has declined. *Id.* at 44,490.

FDA found that advertising near schools and playgrounds poses special dangers because children are repeatedly and unavoidably exposed to advertising in those locations. 61 Fed. Reg. at 44,467. FDA identified areas within 1000 feet of a school or playground as places that should be free of advertising because those are the areas that children most often pass by on their way to schools and playgrounds and on their way home from those locations. *Id.* at 44,503. FDA also found that adolescents are likely to congregate around stores near schools and playgrounds and that the tobacco industry has attempted to exploit that fact. Stores within 1000 feet of a school had a significantly greater percentage of windows covered with tobacco signs than stores further away, and two RJR memos mention the importance of supplying stores near high schools with young adult materials. *Id.* at 44,504.[8]

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[8] Petitioners themselves have recognized the special impact of outdoor advertising because, as they acknowledge (Br. 46-47), petitioners have since 1990 refrained from placing advertising on billboards within 500 feet of schools. See Pet. App. 31a.

The cumulative force of that evidence overwhelmingly supports the State's judgment that tobacco advertising plays a significant role in the decision of children to smoke. See *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 626-629 (1995) (surveys and anecdotal evidence sufficient to support no-solicitation rule); cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (court in First Amendment case is limited to examining whether government drew reasonable inferences based on substantial evidence). Moreover, as this Court has repeatedly recognized, it is simply a matter of common sense that advertising increases demand for a product. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Central Hudson*, 447 U.S. at 569.

Petitioners argue (Br. 43-44) that the restrictions at issue here will not materially advance the State's interests because the Master Settlement Agreement (MSA) between the States and a number of cigarette manufacturers already restricts outdoor advertising to some extent by barring petitioners from displaying advertising outdoors or on the inside surface of a window facing outward unless it occupies an area of 14 square feet or less. The MSA, however, applies only to the manufacturers who have signed it. It does not restrict advertising by other manufacturers or by any retailer. Moreover, the MSA does not apply to outdoor advertising at retail stores that falls within the 14-square-feet exemption. As discussed above, adolescents are repeatedly and unavoidably exposed to outside advertising at retail locations that are near schools and playgrounds. The recent practices of the tobacco industry illustrate the magnitude of that problem. Between 1998 and 1999 the tobacco industry increased spending on point-of-sale advertising by 13.3%, from $290.7 million to $329.4 million. FTC, *Cigarette Report for 1999*, at 4 (2001) (FTC Report). The State therefore had ample reason to conclude that the MSA is not

sufficient to serve its compelling interest in preventing underage tobacco use.

D. The State's advertising restrictions are also not "more extensive than is necessary to serve" its compelling interests. *Central Hudson*, 447 U.S. at 566. To satisfy that prong of the inquiry, the State need not show that it has chosen the "least restrictive means." Instead, it need only show that there is a "'fit' between the [government's] ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable." *Board of Trustees of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks and citation omitted). That standard is readily satisfied here. By placing restrictions on advertising within 1000 feet of schools and playgrounds, the State has carefully tailored its restrictions to the areas where children are most likely to be repeatedly and unavoidably exposed to tobacco advertising. See 21 U.S.C. 860 (mandating a 1000-foot drug-free zone around schools and playgrounds).

Petitioners argue (Br. 45) that the restrictions are not narrowly drawn because they prohibit outdoor advertising in 90% of the areas in the three largest cities in Massachusetts. That argument is unpersuasive.[9] In *Went For It*, the Court upheld a regulation that prohibits personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The Court rejected the contention that the regulation restricted communication too extensively, reasoning that lawyers could use television, radio, newspapers, billboards, untargeted letters, and the yellow pages to advertise their services. 515 U.S. at 634. The regulation therefore left

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[9] In *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), seven Justices apparently were of the view that a city could entirely eliminate billboard advertising within its borders. See *id.* at 508-512 (plurality opinion); *id.* at 552-553 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

"ample alternative channels for receipt of information about the availability of legal representation." *Ibid.* In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986), the Court upheld the constitutionality of a zoning ordinance that limited adult book stores to five per cent of the land area in the city. The Court explained that "the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." *Id.* at 54.

Similarly here, even limiting the inquiry to the three largest cities, rather than to the State as a whole, petitioners have a variety of means to promote their products to adults. They can locate outdoor advertising in 10% of the areas in those cities, double the area available in Renton. Even more important, they can distribute information about their products through newspapers, magazines, direct mail, personal solicitation, promotions, and other means. Petitioners have not had difficulty exercising those options. Between 1998 and 1999, the cigarette industry's expenditures on advertising and promotion rose from $6.7 billion to $8.2 billion. FTC Report 16. The regulations therefore leave tobacco manufacturers with adequate opportunities to convey "information as to who is producing and selling what product, for what reason, and at what price" to adults who are interested in obtaining such information. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

There also are not any "obvious less-burdensome alternatives to the restriction on commercial speech." *Went For It*, 515 U.S. at 632 (citation omitted). Petitioners argue (Br. 45) that the State should pursue its interests through more rigorous enforcement of its laws that prohibit retailers from selling tobacco products to children. The State submitted evidence, however, that it already has one of the most rigorous enforcement programs in the United States and

that too many children are still able to obtain access to tobacco products. J.A. 90-96.

The State's experience is not surprising. HHS has established 80% compliance with the prohibitions on sale of tobacco products to children as a realistic goal for States to strive to achieve. 61 Fed. Reg. 1499 (1996). Moreover, because many children obtain cigarettes from friends and relatives, J.A. 290, even perfect compliance with the prohibition on sales would not fully achieve the State's purposes. For those reasons, efforts to reduce the supply of tobacco products to children represent only a partial solution to the problem of underage tobacco use. Advertising restrictions complement efforts to reduce supply because they attack a problem that such enforcement efforts do not address—the demand for tobacco that advertising creates and nourishes in minors.

Petitioners also argue (Br. 45) that the State should make it unlawful for minors to purchase tobacco products. That alternative is not an "obvious less-burdensome alternativ[e]." *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Turning children who purchase or obtain tobacco products into criminals raises sensitive policy issues, and States can reasonably view such an alternative as an unacceptable option. Moreover, like a prohibition on sale, a prohibition on the purchase of tobacco simply does not address the distinct problem posed by cigarette advertising —that it stimulates demand for the product.

Finally, in balancing the relevant considerations to assess whether the restrictions imposed by the Massachusetts regulations are more extensive than is called for to serve the State's compelling interests, it is surely relevant that (1) the sale of cigarettes to minors is unlawful and the commercial transactions proposed or promoted by cigarette advertising therefore are unlawful to that extent; (2) the effects of tobacco use on impressionable minors who may be induced to begin or continue smoking are profound and longlasting,

while the asserted benefits of outdoor advertising of cigarettes for petitioners and adult consumers are more fleeting and capable of being realized in other ways; (3) the great majority of adult tobacco users to whom the advertising may lawfully be directed are addicted to the product; and (4) the tobacco use promoted by petitioners' advertising is—particularly among children and adolescents but among adults as well—"perhaps the single most significant threat to public health in the United States." *Brown & Williamson*, 529 U.S. at 161. It therefore is especially appropriate to give the State full berth for the effectuation of its compelling interests served by the prohibition against cigarette advertising within 1000 feet of schools and playgrounds.[10]

E. Petitioners argue (Br. 26-41) that the Court should subject the State's restrictions to the same strict scrutiny standard that it applies to non-commercial speech that is "content" or "viewpoint" based. Petitioners' suggestion that the Court abandon the *Central Hudson* framework for evaluating restrictions on commercial speech should be rejected. *Central Hudson*'s middle-tier scrutiny strikes the

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[10] Petitioners' reliance (Br. 47-49) on *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Carey* v. *Population Services International*, 431 U.S. 678 (1977), is misplaced. In *Bolger*, the Court invalidated a statute prohibiting unsolicited mailed advertisements for contraceptives. The Court reasoned that parents exercise substantial control over their mailboxes and can prevent mailings from reaching their children through the "short, though regular, journey from mail box to trash can." 463 U.S. at 72-74 (citation omitted). In contrast, parents have no effective means to protect children on their way to schools and playgrounds from having outdoor advertising "thrust upon them by all the arts and devices that skill can produce." *Packer Corp.*, 285 U.S. at 110. In *Carey*, the Court invalidated a law that prohibited advertising concerning contraceptives. The Court explained that the law sought "to suppress completely" any information about the availability and price of "products and services that are not only entirely legal, but constitutionally protected." 431 U.S. at 700-701 (citation omitted). The State in this case does not seek to suppress completely any information about the availability and price of tobacco products, and there is no constitutional right to use tobacco products.

appropriate balance between a seller's interest in proposing a commercial transaction and the State's right to regulate speech that is intimately bound up with regulable economic activity. The application of *Central Hudson* has resulted in the invalidation of unnecessary restraints, while still giving government flexibility to protect consumers from economic activity that poses risks to public safety and health. Petitioners offer no persuasive reason for the Court to invalidate restrictions on commercial speech where the government can demonstrate that they directly and materially further substantial interests and are no more extensive than necessary to serve those interests.

Petitioners' proposal could also have far-reaching consequences. For example, if the state regulation at issue here must be subjected to strict scrutiny because it is "content based" and "viewpoint based," it is difficult to see why Congress's prohibition on cigarette advertising on television and radio should not be subjected to strict scrutiny. 15 U.S.C. 1335. Other federal statutory restrictions on commercial speech are also capable of being characterized as "content based" or "viewpoint based." See 15 U.S.C. 1336 (recognizing and preserving FTC authority with respect to unfair or deceptive acts or practices in cigarette advertising); 15 U.S.C. 1681 (limiting dissemination of credit reports); 15 U.S.C. 6501 (Supp. IV 1998) (implementing privacy protection provisions); 21 U.S.C. 343(r) (1994 & Supp. IV 1998) (authorizing FDA to place restrictions on labeling claims about nutrients). Petitioners' rule would also seemingly call for strict scrutiny of any restriction on the outdoor advertising of firearms within 1000 feet of a school or playground. This Court should reject a proposal that would so destabilize the law.

Some Members of this Court have suggested that a more searching scrutiny might be appropriate "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preserva-

tion of a fair bargaining process." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., joined by Kennedy and Ginsburg, J.J.). Laws meeting that description, however, can be fairly analyzed under the *Central Hudson* inquiry. There is no reason to add a new standard of review to judge such restraints. *Id.* at 532 (O'Connor, J., joined by Rehnquist, C.J. and Souter and Breyer, J.J., concurring in the judgment).

Even if such a rule were adopted, however, it would have no application in this case. The restrictions at issue here do not "entirely prohibit" the dissemination of information about tobacco. They apply only near schools and playgrounds, and petitioners have numerous alternative means to disseminate information about tobacco to adults. Nor are the State's reasons for imposing its restrictions unrelated to the preservation of a fair bargaining process. The State justifiably views any bargain between tobacco manufacturers and children as inherently unfair, both because the State has made the sale of tobacco products to children unlawful, cf. *Edge Broad. Co.*, 509 U.S. at 428, and because so many children lack the maturity in judgment to resist the tobacco industry's appeals to excitement, glamour, and independence, and to appreciate the addictive power and health risks of tobacco products, cf. *FTC* v. *Keppel & Bro.*, 291 U.S. 304, 309 (1934). The State's interest in preventing such unfairness is at its apex when the State seeks to limit tobacco advertising near schools and playgrounds, where children are repeatedly and unavoidably exposed to the advertising.

This is also not a case in which the government's asserted interest is to keep adults who may lawfully consume a product ignorant based on a paternalistic view that they will otherwise make irresponsible choices. See *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in the judgment). Children are not lawful consumers of tobacco, and the government has significant leeway to act

paternalistically when its goal is to protect children from making irresponsibly dangerous choices.

This case also does not remotely resemble the hypothetical prohibition on advertising that is demeaning to men discussed in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 389 (1992). Such a statute would ordinarily have no plausible relationship to a State's interest in any underlying commercial transaction. Here, by contrast, the State's restrictions on tobacco advertising near schools and playgrounds is directly related to the State's interest in preventing the unlawful sale of tobacco products to children.

Finally, the application of strict scrutiny is particularly unwarranted here. Petitioners disclaim any First Amendment interest in persuading children to smoke or, for that matter, in persuading anyone who is not already smoking to smoke. Their sole professed interest is in persuading persons who already smoke to choose their brand rather than their competitor's. 61 Fed. Reg. at 44,494. There is no evidence, however, that the State is taking sides in that "debate" among competitors. Instead, the State's sole asserted interest is in preventing petitioners from (intentionally or unintentionally) persuading children to smoke a product that cannot lawfully be sold to them and that is likely to cause one out of every three who become addicted to it to die a premature death. The First Amendment does not prevent a State from sensibly pursuing that interest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A., INC., ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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STATEMENT OF INTEREST[1]

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. ANA's members rely on advertising to market a kaleidoscopic array of goods and services. As the nation's principal community of commercial speakers, ANA has long been committed to First Amendment protection of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

ANA has appeared routinely as an amicus curiae in commercial speech cases before this Court. In *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 184 n.3 (1999), this Court cited ANA's brief for its articulation of the position that truthful, nonmisleading commercial speech should be protected by a strict scrutiny standard, instead of the current *Central Hudson*[2] test.

This appeal is of particular importance to ANA and its members. Under the First Circuit's reasoning, the judiciary would exercise virtually no check on a government

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

[2] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

that seeks to impose content-based restrictions on truthful advertising for the asserted purpose of protecting children. Such unquestioning deference to a governmental censor jeopardizes the commercial speech rights of all advertisers and their audiences.[3]

SUMMARY OF ARGUMENT

The decision of the court of appeals threatens to eliminate the constitutional guarantee of free speech with respect to a broad range of protected messages. This Court has stated repeatedly that content-based restrictions on speech are presumptively invalid. The list of exceptions to that rule has been deliberately kept short and narrowly defined. In the First Circuit's dangerous view, however, that list should be expanded to include any speech restriction that a government claims was adopted to protect children.

Creation of a "child protection" exception to the First Amendment has been rejected by numerous decisions of this Court. While efforts to childproof the flow of speech in our society might be politically popular, such restrictions would impose a constitutionally intolerable burden on adult-to-adult communications and would intrude on

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[3] Although ANA does not address the federal preemption claim in this case, it agrees with petitioners that the Massachusetts regulations are preempted under the Federal Cigarette Labeling and Advertising Act, as made plain by the Ninth Circuit's analysis of a similar issue in *Lindsey v. Tacoma-Pierce County Health Dep't*, 203 F.3d 1150 (9th Cir. 2000).

the rights of parents to control the education of their children.

If government did have more leeway to restrict speech when it claimed to be protecting children, the range of public discussion in our nation could be severely compromised. Politicians could characterize a wide range of speech as harmful to minors. The forbidden topics would relate not only to child-sensitive products and services, but also to art and entertainment. In order to preserve the full range of speech, "child protection" must not become magic words that make First Amendment rights disappear.

The instant case illustrates the danger of adopting a "child protection" exception to the First Amendment. The First Circuit, believing that such an exception exists, greatly diluted its review of the record in this case. Rather than presume that the Massachusetts regulations are invalid – as required by the First Amendment – the court apparently thought that the regulations should be upheld as long as the government had a superficially reasonable basis for their adoption. In reversing the First Circuit's decision, this Court again should reject the notion that there exists a "child protection" exception to the First Amendment.

ARGUMENT

I. CONTENT-BASED RESTRICTIONS ON SPEECH ARE PRESUMPTIVELY INVALID UNLESS THE RESTRICTED SPEECH FALLS WITHIN CERTAIN NARROW EXCEPTIONS

Just last term, the Court reiterated one of the fundamental principles of its First Amendment jurisprudence: "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1889 (2000). Put another way, "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

The First Amendment serves a fundamental national interest by treating content-based restrictions on speech as anathema:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994).

For these reasons, the First Amendment does not countenance governmental control over the content of messages expressed by private individuals, "subject only to narrow and well-understood" exceptions. *Id.* at 641. This Court seeks to ensure that the line is "finely drawn" between speech that falls within those exceptions and speech that is "unconditionally guaranteed." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The short list of exceptions to full First Amendment protection includes obscenity, defamation, "fighting words," and commercial speech that either is false or misleading, or promotes a product or service that is unlawful for all consumers. *See infra* at 6.

During the past decade, this Court has sharpened the line between protected and unprotected commercial speech. The philosophical underpinning for this line-drawing is expressed best in *R.A.V.*, which happens to be a noncommercial speech case. There, the Court held that government may not restrict the content of speech for reasons other than those that make a particular category of speech proscribable, rather than fully protected. *Id.* at 387-88. The Court invalidated the speech restrictions in *R.A.V.* because defendant City of St. Paul had restricted "fighting words" not because of the likelihood of a violent response, but in order to impose special prohibitions on "those speakers who express[ed] views on disfavored subjects." *Id.* at 391. More to the point, the Court added that this same First Amendment principle would mean that government cannot restrict the content of commercial speech for reasons other than those that could justify depriving it of full First Amendment protection, such as the risk of fraud. *See id.* at 388-89 (citations omitted).

One year after *R.A.V.*, this Court restated the principle that only a narrow sub-category of commercial speech is excluded from the general body of speech that presumptively is guaranteed by the First Amendment. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993), the Court explained that commercial speech may be subjected to greater governmental regulation than noncommercial speech only when government asserts an interest in preventing "commercial harms."

R.A.V. again was invoked in spirit if not in name when Justice Stevens, writing in *44 Liquormart* and joined by Justices Kennedy and Ginsburg, endorsed application of strict scrutiny to content-based restrictions on commercial speech: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process [*i.e.*, prevention of overreaching or deception], there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

Moreover, there are numerous reasons why the courts should adhere in the context of content-based restrictions on commercial speech to the "rigorous review that the First Amendment generally demands." *See id.* As this Court has observed, a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (citations omitted). Content

discrimination not only hinders discussion about the relative merits of various products and services, but also whether and to what extent the underlying economic activities should be regulated. *See 44 Liquormart*, 517 U.S. at 503 (principal opinion). For example, the nation currently is engaged in a very visible debate concerning tobacco products. Particularly at this time, Massachusetts should not be able to enforce its regulations, which restrict the flow of commercial messages that otherwise would both stimulate and inform this important national debate. *See id.* Further, as members of this Court have recognized, the historical evidence of original intent supports full First Amendment protection for commercial speech. *See id.* at 517 (Scalia, J., concurring); *id.* at 522 (Thomas, J., concurring).

When these principles are applied to the Massachusetts regulations, it is clear that the regulations do not fall within an exception to the First Amendment's prohibition of content-based restrictions on speech. As a threshold matter, the Massachusetts regulations undoubtedly are content-based – they apply only to advertisements that seek to promote the sale of tobacco products. *See Reno v. A.C.L.U.*, 521 U.S. 844, 867-68 (1997). In fact, the First Circuit itself recognized that the regulations are content-based and focused on the messages and images conveyed by tobacco advertising. *See* App. 14a, 29a.

The Attorney General's content-based regulations do not fall within the exception to the First Amendment for commercial speech that is false or misleading, or that promotes a product or service that is unlawful for all consumers. Massachusetts does not dispute that the

advertisements it seeks to restrict are truthful and non-misleading. Nor does the government claim that tobacco use is unlawful; indeed, even minors may possess and use tobacco in Massachusetts.[4] *See* App. 32a.

Thus, the First Circuit should not have treated the Massachusetts regulations as if they fell within any of the established exceptions to the general rule against content-based restrictions on speech. More to the point, the court of appeals should not have attempted to create a new exception to the First Amendment. Nonetheless, the First Circuit did just that, suggesting that government has greater leeway to restrict speech directed to adults when it believes the speech is harmful to children. As discussed below, this Court repeatedly has rejected attempts by government to create such a new exception to the First Amendment.

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[4] Although the sale of tobacco products to minors is illegal in Massachusetts, the regulations restrict all advertising for tobacco products, regardless of whether that advertising is intentionally targeted to minors. In any event, the fact that minors may not lawfully purchase tobacco products cannot justify a restriction on communications between tobacco advertisers and adults.

II. THERE IS NO EXCEPTION FROM GENERAL FIRST AMENDMENT PRINCIPLES FOR SPEECH RESTRICTIONS ADOPTED IN THE NAME OF PROTECTING CHILDREN

A. This Court Repeatedly Has Held that a Legislature's Asserted Interest in Protecting Children Cannot Trump First Amendment Rights

This is not the first case, nor likely will it be the last, where government claims that it must restrict speech directed to adults in order to protect children. Similarly, the Attorney General is not unique among would-be censors in urging this Court that "government has more latitude to regulate even noncommercial speech where its purpose is to protect children from particular risks associated with it." Respondent's Brief in Opposition at 20. But this Court consistently has rejected such arguments for a "child protection" exception to the First Amendment's presumptive guarantee of free speech. *See Reno*, 521 U.S. 844; *Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

In *Joseph Burstyn*, the Court overturned a ban on a specific film, notwithstanding the government's argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." *Id.* at 502. The Court stated that, even if there were capacity for such evil, it would not authorize "substantially unbridled censorship." *Id.*

In *Butler*, the Court invalidated Michigan's prohibition on the sale of materials "tending to incite minors to

violent or depraved or immoral acts, [or] manifestly tending to the corruption of the morals of youth . . . . " 352 U.S. at 381. The Court held that the challenged law impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. It added, "[s]urely, this is to burn the house to roast the pig." *Id.*

In *Bolger*, the Court relied on *Butler* to strike down as unconstitutional a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. 463 U.S. at 73-74. Noting that the unsolicited advertisements were "entirely suitable for adults," the Court invalidated the statute as an impermissible restriction on commercial speech. *Id.*

This principle again was applied to a restriction on indecent speech in *Sable*. At issue was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." In reliance on *Butler* and *Bolger*, the Court struck down the ban because it "ha[d] the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." 492 U.S. at 131.

More recently in *Reno*, the Court held unconstitutional provisions of the Communications Decency Act of 1996 that sought to protect minors from indecent material on the Internet, but that also interfered with the ability of adults to communicate with one another. The Court again explained that government's assertion of a "child protection" interest does not reduce its burden to justify restrictions on adult-to-adult communications. As the Court stated, "[i]t is true that we have repeatedly recognized

the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. *See also Playboy Entertainment Group*, 120 S. Ct. 1878 (invalidating federal law which required cable television operators providing indecent programming to restrict their transmission so as to shield children from "signal bleed").

Apart from the First Amendment, there is another reason why government does not have license to restrict speech in the name of protecting children: the Constitution entrusts parents, not government, with the primary responsibility of supervising the exposure of children to various types of speech. As recently held in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 2060 (2000), "[i]n light of [this Court's] extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

This Court's consistent recognition of the preeminent role of parents militates against the constitutionality of laws that take child-rearing decisions out of the hands of parents and place them into the hands of a censoring government. Parents should have the unfettered right to expose and educate their children with respect to all variety of speech (as long as that speech does not fall within one of the exceptions to the First Amendment), regardless of whether some people might find certain messages offensive. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 (9th Cir. 1998) (stating that a "necessary component of any education is learning to

think critically about offensive ideas – without that ability one can do little to respond to them").[5]

Thus, for three independent reasons – the rights of speakers to communicate messages to adults, the rights of adults to receive those messages, and the rights of parents to control the development and education of their children – there is not, and should not be, a "child protection" exception to the First Amendment.

B. The First Circuit Erred in Holding that Government Has Greater Leeway to Restrict Speech Where Children Are Concerned

The court of appeals did not heed this Court's repeated rejection of attempts to create a new exception to the First Amendment whenever government claims that its goal is to protect children. Instead, the First Circuit incorrectly stated that, "the courts have consistently recognized that the government may act more protectively where children are concerned." App. 18a. As purported support for its view of First Amendment law, the First Circuit cited two decisions, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Anheuser-Busch, Inc.*

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[5] Massachusetts cannot argue that government has greater power to restrict outdoor advertising than other media because exposure to such advertising is allegedly more difficult for parents to control. Similar arguments could be (and have been) made about virtually every medium. Such arguments cannot be accepted without risking that the resulting exceptions to full First Amendment protection would swallow the rule. *See Joseph Burstyn*, 343 U.S. at 503. Indeed, this Court invalidated the restrictions on indecent television programming in *Playboy Entertainment Group*, even though such speech could "come[ ] into the home without parental consent." 120 S. Ct. at 1886.

v. Schmoke, 101 F.3d 325 (4th Cir. 1996). Neither of those cases supports the First Circuit's deferential approach to censorship.

The First Circuit failed to note that the result in *Erznoznik* actually contradicts the existence of a "child protection" exception. The *Erznoznik* Court found a governmental interest in "child protection" insufficient to support a city ordinance prohibiting the showing of films containing nudity by drive-in theaters whose screens are visible from a public street. 422 U.S. at 212-13. Moreover, the Court struck down the ordinance because of its impact on the First Amendment rights of minors themselves. *See id.* Contrary to the First Circuit's view, the *Erznoznik* Court did not hold that government's burden to justify interference with adult-to-adult communications is reduced by an asserted interest in child protection.

Unlike *Erznoznik*, the Fourth Circuit's decision in *Anheuser-Busch* at least supports the First Circuit's view that child-sensitive speech should receive reduced First Amendment protection. The Fourth Circuit attributed to this Court a "repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." 101 F.3d at 329. But the Fourth Circuit's interpretation of this Court's decisions was in error at the time that it was issued and is even more clearly in error today. *See Playboy Entertainment Group*, 120 S. Ct. at 1886-87 (reiterating that a governmental objective of shielding children does not suffice to support restrictions on adult-to-adult communications).

The Fourth Circuit mistakenly pointed to five decisions of this Court to support its "special solicitude" argument.[6] Each of the five decisions may be considered in turn. In *Ginsberg*, the Court upheld a ban on the sale of magazines that were obscene as to minors. *Ginsberg* does not support the proposition that speech directed to adults may be restricted when government seeks to protect children. Unlike the instant case, the ban affected minors only, and had no impact on adults, who were free to buy the magazines in question.

Osborne and *Ferber* may be considered together, as they are both child pornography cases. In both cases, this Court upheld statutes that banned the distribution of child pornography in order to protect children from the underlying criminal act required to produce such material. The Massachusetts regulations, in contrast, restrict tobacco advertising even though there is no criminal act involved in the production of tobacco products. Unlike the speech at issue in the child pornography cases, tobacco advertising cannot be characterized as arising from a criminal act. Indeed, *Osborne* and *Ferber* are entirely consistent with the rule that truthful, nonmisleading advertising loses its full First Amendment protection if it promotes a product or service that is unlawful for all consumers.

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[6] *See Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996); *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

As for *Pacifica*, this Court repeatedly has stated that it is an "emphatically narrow holding," so the Fourth Circuit erred by attempting to derive a broad exception to the First Amendment from it. *See Reno*, 521 U.S. at 870 (citation omitted). Moreover, *Pacifica* is inapplicable here for many of the same reasons that it was held inapplicable in *Reno*. *See id.* at 867. Unlike the FCC order in *Pacifica*, which "targeted a specific broadcast that represented a rather dramatic departure from traditional program content," the Massachusetts regulations apply to all tobacco advertising in the restricted zone. *Id.* Further, *Pacifica* is distinguishable because it involved television, "which as a matter of history had 'received the most limited First Amendment protection.' "[7] *Id.* Apart from the reasons identified in *Reno*, *Pacifica* also is inapplicable here because it involved indecent speech, not advertising. Whereas government typically argues that indecent speech harms children immediately upon their exposure to it, no such argument can be made as to non-indecent commercial speech.

Denver Area actually contradicts the "special solicitude" argument. In the only section of the principal opinion that was joined by a majority of the Justices, the Court

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[7] The *Pacifica* Court relied on a "scarcity" rationale to justify greater regulation of broadcast television, but scarcity of the broadcast spectrum is far less significant today in light of the proliferation of new media, including cable television. Consequently, *Pacifica* may no longer be good law. *See Turner Broad. Sys.*, 512 U.S. at 638 (noting that the continuing validity of *Pacifica* has been called into question by courts and commentators).

invalidated the federal law requiring cable system operators to segregate and block sex-related programming. 518 U.S. at 753-60. In rejecting the government's argument that the restriction was necessary to protect children, the Court reiterated that the First Amendment does not permit reducing the adult population to viewing only what is fit for children. *See id.* at 759; *id.* at 807 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

As demonstrated above, there is no support in this Court's cases for the Fourth Circuit's position, adopted by the First Circuit here, that children receive "special solicitude" in the First Amendment balance. Not surprisingly, First Amendment commentators have bluntly condemned the Fourth Circuit's overly deferential review of speech restrictions adopted in the name of protecting children.[8]

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[8] *See* 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 20:24 (1997 ed.) ("The panel's decision in *Anheuser-Busch II* simply cannot be squared with the jurisprudence of *44 Liquormart*."); Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 Case W. Res. L. Rev. 681, 729 (1997) (criticizing the Fourth Circuit for showing "a remarkable willingness to accept weak and even nonexistent evidence in support of commercial speech regulations."); William D. O'Neill, *Governmental Restrictions on Beverage Alcohol Advertising After 44 Liquormart v. Rhode Island*, 42 St. Louis U. L.J. 267, 296 (1998); Andrew S. Gollin, *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 Marq. L. Rev. 873, 903 (1998); Thomas D. Blue, Jr., *Over the Edge: The Fourth Circuit's Commercial Speech Analysis in Penn Advertising and Anheuser-Busch*, 74 N.C. L. Rev. 2086, 2089 (1996).

In short, the First Circuit erred in concluding that First Amendment scrutiny of Massachusetts' content-based restrictions on speech should be reduced because the government asserted an interest in protecting children. As discussed below, if such a "child protection" exception to the First Amendment were created, an enormous amount of fully protected speech would be placed in jeopardy.

III. THE FIRST CIRCUIT'S ATTEMPT TO CREATE A "CHILD PROTECTION" EXCEPTION TO THE FIRST AMENDMENT ENDANGERS A WIDE RANGE OF SPEECH

Today, would-be regulators of speech routinely attempt to dress up censorship in the cloak of protection of children. In contemporary society, however, where adults and minors often are exposed to the same media, it is difficult to keep communications away from children without simultaneously restricting the rights of adults to communicate with one another. If a "child protection" exception to the First Amendment were to become the law – as the First Circuit's opinion contemplates – governments quickly would seize upon that exception to justify all manner of restrictions on adult-to-adult communications.

This case illustrates how a "child protection" exception to the First Amendment would provide government with a simple recipe for creating speech restrictions that would withstand constitutional scrutiny. First, government would select the disfavored or unpopular speech that it would like to restrict. Next, government would assert that such speech must be restricted in order to

protect children. In the vast majority of cases, government could make this assertion with a straight face, as children often are perceived as a vulnerable audience, and government would argue that they more likely would be harmed by the "offensive" speech. Then, government would claim that children frequent the entire geographic area of the relevant jurisdiction and, consequently, that the "offensive" speech must be largely eliminated from the landscape. Based on these factors, government would adopt far-reaching restrictions on speech that, while ostensibly adopted for the sole purpose of protecting minors, in fact would decimate the ability of adults to communicate with one another. If such a speech restriction were challenged in court, government would insist that its "child protection" purpose allows it to bypass the First Amendment.

That is precisely what happened in Massachusetts. Nobody would dispute that tobacco is one of the most controversial products in our nation. Not surprisingly, elected politicians in Massachusetts targeted speech about tobacco for censorship. They claimed that minors are particularly vulnerable to tobacco advertising and that their daily activities take them throughout the towns and cities where they live. The result: adults are now restricted from communicating with one another concerning a lawful product in up to 90 percent of the geographic area in Massachusetts' three largest cities.[9] *See* App. 30a.

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[9] The Attorney General cannot save his regulations by arguing that tobacco advertisers have other, unrestricted means to communicate with adults. This Court has rejected the argument that a content-based restriction on speech should

This recipe for censorship could be followed by government to justify restrictions on a wide range of speech. If the First Circuit's decision were affirmed, existing case law that invalidated "child protection" speech restrictions would be called into question. Further, speech restrictions that are currently on the books, but that are of dubious constitutional validity, suddenly would become impervious to attack.

The list of products and services that could be deemed harmful to children is limited only by the imagination of politicians. For example, the First Circuit's reasoning would permit the restriction of automobile advertising by governments that claimed to be fighting illegal underage driving. Adoption of a "child protection" exception would encourage governments to disregard existing case law that invalidated restrictions on advertising for contraceptives.[10] Other obvious targets include the numerous products and services that children are

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receive less First Amendment scrutiny when it affects only one mode of communication. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

[10] *See Bolger*, 463 U.S. 60 (striking down a federal statute prohibiting mailing of unsolicited advertisements for contraceptives, over arguments that such speech was inappropriate for children); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (holding that a State could not prohibit contraceptive advertisements for asserted purpose of protecting minors); *AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79 (D. Mass. 1994), *aff'd*, 42 F.3d 1 (1st Cir. 1994) (holding that government may not reject advertisements, which used witty sexual innuendoes in promoting use of condoms to prevent spread of AIDS, in order to protect minors).

restricted from buying or using. Minors typically may not purchase alcohol, gamble, or play the lottery. Children also may not buy fireworks, explosives, guns, poison, pesticides, toxic substances, spray paint, securities, prescription medication, or tickets for public transportation. Similarly, children are discouraged, and often prevented by law, from using escort services, entering bars or billiard rooms, renting hotel or motel rooms, using fee-based telephone services, making financial investments, or obtaining credit cards or insurance. The mere fact that certain products and services are off-limits for children cannot mean that government may prohibit adults from communicating with one another about those products and services.

Importantly, the risks posed by a "child protection" exception are not limited to commercial speech, but include noncommercial speech as well, because of the broad language used by the First Circuit and the Fourth Circuit in their declarations of a "child protection" exception. *See* App. 18a-19a; *Anheuser-Busch*, 101 F.3d at 329. The motion picture and video industries could lose their ability to market,[11]

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[11] *See Motion Picture Ass'n of America v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970) (striking down statute criminalizing presentation of preview rated not suitable for children); *see also* Fla. Stat. Ann. § 501.138 (West 2000) ("Any motion picture theatre owner or operator who desires to exhibit, on the same program, a motion picture which has received a 'G' rating and which he or she advertises as 'G' rated, and a preview or trailer of a motion picture which has not received a 'G' rating, shall in all such advertising of the program give notice to the public of the exhibition of the preview or trailer"); Ky. Rev. Stat. Ann. § 231.180 (West 2001) ("No movie theatre, drive-in theatre, or other facility requiring a fee for admission shall show an 'X' or

rent[12] or exhibit[13] adult-rated or violent movies. Similar restrictions could affect the content of televised political commercials,[14] sporting events[15] and

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'R' rated movie in their previews if a 'G' or 'GP' movie is playing"); R.I. Gen. Laws § 42-43-9 (West 1999) (same); Va. Code Ann. § 18.2-386 (West 2000) (same).

[12] *See U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555, 557-59 (3d Cir. 1997) (holding unconstitutional regulations prohibiting video store operator from using preview booths where sole basis for board's restrictions was "a desire to protect minors from exposure to adult entertainment"); Md. Com. Law § 14-1602 (West 2000) ("A person may not sell at retail or rent, or attempt to sell at retail or rent, a video movie in this state unless the official rating of the motion picture from which it is copied is clearly displayed on the outside of any cassette, case, jacket, or other covering of the video movie.").

[13] *See Erznoznik*, 422 U.S. 205 (holding ordinance aimed at prohibiting youths from viewing films containing nudity was broader than permissible); *see also* Del. Code Ann. § 1366 (West 1999) (forbidding owners and operators of outdoor motion picture theatres from exhibiting films "not suitable for minors" where film can be viewed by such minors not in attendance at the said outdoor movie theatre; and defining "not suitable for minors" as "any film, reel or view which has a rating of 'R' or 'X' "); R.I. Gen. Laws § 42-43-10 (West 1999) (same); S.C. Code § 52-3-110 (West 2000) (same); Tenn. Code Ann. § 39-17-907 (West 1999) (same).

[14] *See Becker v. F.C.C.*, 95 F.3d 75, 320 U.S.App.D.C. 387 (1996) (finding impermissible an FCC order permitting broadcast licensee to restrict broadcast of campaign advertisements portraying images of aborted fetuses to times of the day when children were less likely to be in viewing audience).

[15] *See* Robert Corn-Revere, *TV Violence*, Congressional Testimony by Federal Document Clearing House, May 18, 1999, *available in* 1999 WL 16948007 (discussing the "socially-sanctioned violence of professional sports" as conceivably "a source of the most widespread social effects of all"); *FCC*,

regular programming.[16]

Similarly, if government were permitted to childproof the flow of communications in our society, there would be a stifling of the incentive to create, advertise, or sell music that might not be suitable for children. At risk of censorship would be music containing violent[17] or erotic[18] lyrics that arguably might be harmful to minors.

As illustrated by the above examples, this case is not simply about tobacco. Nor will the impact of this Court's

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Warren's Cable Regulation Monitor, Oct. 25, 1999, *available in* 1999 WL 6826245 (discussing FCC Commissioner's vow to restrict media violence and his attack on pro-wrestling as "a particular example of media violence" and claiming that children do not understand wrestling violence is staged).

[16] *See Olivia N. v. Nat'l Broad. Co., Inc.*, 126 Cal. App. 3d 488, 178 Cal.Rptr. 888 (1981) (refusing to impose liability on broadcasting companies for injuries inflicted by certain juveniles allegedly acting upon stimulus of observing "artificial rape" scene on television drama).

[17] *See Torries v. Hebert*, 111 F. Supp. 2d 806 (W.D. La. 2000) (holding that First Amendment rights were violated by prosecution of skating rink proprietor for contributing to delinquency of minors by playing of "gangster rap" at skating events); *Waller v. Osbourne*, 763 F. Supp. 1144 (1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992), *cert. denied*, 506 U.S. 916 (1992) (holding First Amendment rights of creators of song which allegedly induced teenage boy to commit suicide protected creators from being held liable for the boy's death); Jerry Flattum, *Gangsta Rappers Have Gone Too Far*, U-Wire (Minn.), Jan. 22, 1999, *available in* 1999 WL 5935427 (discussing Senate Committee's probe into impact of violent rap lyrics on children).

[18] *See Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 871 P.2d 1050 (1994) (finding erotic sound recordings statute unconstitutional).

decision necessarily be limited to advertising. Rather, this Court should reject explicitly the First Circuit's "child protection" exception to the First Amendment in order to preserve the free flow of a wide range of speech.

IV. THE DECISION BELOW SHOULD BE REVERSED UNDER EITHER STRICT SCRUTINY OR THE *CENTRAL HUDSON* TEST

The First Circuit's deference to governmental censorship exemplifies the type of judicial approach that Professor Catherine J. Ross warned against in her article, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vand. L. Rev. 427, 466 (2000):

> Where protection of children is invoked as an interest, cogent legal analysis too often is deemed gratuitous. Many factors contribute to this analytic looseness. These factors include an emotional response to children's vulnerability, an irrational sense that if a law is designed to protect children, then it must be good, and the often unquestioned legal principle that while children may have rights, the rights accorded to them are not co-extensive with the rights of adults.

The First Circuit mistakenly believed that the Attorney General's assertion of a "child protection" purpose somehow reduced his constitutional burden of proof. That belief diluted and tainted the court's review of the record in this case. When proper constitutional scrutiny is applied, it is clear that the Attorney General failed to

satisfy his burden under either strict scrutiny or the corresponding requirements of the *Central Hudson* test.[19]

This Court recently has emphasized the importance of holding government to its burden of proof in First Amendment cases. In *Playboy Entertainment Group*, the Court explained, "[i]ndeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas." 120 S. Ct. at 1889. Moreover, the Court stated that, when the evidence submitted on opposing sides on a First Amendment issue amounts to a "draw," the "tie goes to free expression." *Id.* Instead of holding the Attorney General to this standard of proof, the First Circuit mistakenly required him to show only that he had a "reasonable" basis for his speech restrictions.[20]

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[19] Although ANA would welcome this Court's explicit adoption of a strict scrutiny standard, reversal of the First Circuit's decision may be accomplished on the alternative ground that the decision cannot be squared with the *Central Hudson* test. In any event, this Court's recent decisions have made the government's heavy burden under the two tests almost indistinguishable, at least when the regulated advertising is truthful and nonmisleading, and relates to a lawful product or service. *See 44 Liquormart*, 517 U.S. at 501.

[20] For example, the First Circuit failed to require the government to prove the effectiveness of its ban on point-of-sale advertising placed lower than five feet from the floor. Remarkably, the court itself acknowledged its "misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level," but nonetheless held that "such determination falls within the range of

The Attorney General failed to satisfy his constitutional burden of proof in two important respects. First, the Attorney General failed to demonstrate the effectiveness of his speech ban in achieving its asserted goal. This requirement appears both under the strict scrutiny test and the third prong of *Central Hudson*. *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-39 (1980). More specifically, the First Circuit should have required the Attorney General to prove that his restrictions on tobacco advertising would cause a direct and *material* reduction in underage smoking. *See id.*

The court of appeals acknowledged that the government and plaintiffs had submitted conflicting evidence as to whether tobacco advertising in fact causes tobacco use. *See* App. 25a. However, the court held that "the fact that there may exist differences of opinion on this issue is insufficient to deprive Massachusetts of its ability to enact regulations based on a well-founded conclusion that advertising restrictions will reduce tobacco use among young people." App. 27a. The First Circuit erred by refusing to test the evidence submitted by the parties,

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reasonableness in which the Attorney General is best suited to pass judgment." The First Circuit's "reasonableness" approach to reviewing speech restrictions has been rejected by this Court. *See 44 Liquormart*, 517 U.S. at 508 (principal opinion) (rejecting Rhode Island's argument, accepted by First Circuit, that it only needed to show that its price advertising ban was a "reasonable choice"); *id.* at 531 (O'Connor, J., concurring) (stating that the courts may not accept legislative assertions as "reasonable, without further inquiry").

let alone determine whether the evidence was in equipoise, in which event the "tie goes to free expression." *Playboy Entertainment Group*, 120 S. Ct. at 1889.

On a related point, the First Circuit disregarded this Court's decision in *Greater New Orleans* when it considered a key factual issue with respect to the effectiveness of the regulations. That factual issue is whether Massachusetts' restrictions on advertising for tobacco products will cause a material reduction in total youth smoking (as the Attorney General contends), or whether such advertising primarily contributes to brand-switching (as plaintiffs contend).

This Court addressed the "brand-switching" issue in *Greater New Orleans*. In the context of advertising for casinos, the Court stated that, "[w]hile it is no doubt fair to assume that more advertising would have some impact on overall demand for [a product], it is also reasonable to assume that much of that advertising would merely channel [consumers] to one [brand] rather than another." 527 U.S. at 189. This Court's statement is consistent with the extensive scientific evidence submitted by the plaintiffs herein, including the only expert testimony in the record. Remarkably, however, the court of appeals refused to accept this Court's authoritative statement about brand-switching, instead doing no more than citing *Greater New Orleans* with a "but see" signal. *See* App. 26a. At the very least, *Greater New Orleans*, together with plaintiffs' evidentiary submissions, should have raised a triable issue under the "effectiveness" requirement.

As a second reason for reversing the decision below, the government failed to demonstrate that it has used the

"least restrictive means" to advance its goal, or, to put the requirement in *Central Hudson* terms, that it has carefully considered obvious, less burdensome alternatives to censorship. *See 44 Liquormart*, 517 U.S. at 506-08 (Stevens, J.); *id.* at 524-26 (Thomas, J., concurring); *id.* at 528-31 (O'Connor, J., concurring). The court of appeals mistakenly failed to require the government to prove why it did not adopt alternative means for reducing youth smoking that would have no impact on speech.

These alternatives include stricter enforcement or enhanced penalties with respect to laws that prohibit sales of tobacco to minors, anti-tobacco campaigns in schools, and – most obviously – the enactment of a law that would forbid the possession and use of tobacco by minors. Indeed, the court acknowledged that "criminalization of underage tobacco use or possession (or stricter enforcement of existing laws, for that matter) might reduce the amount of current tobacco use." App. 32a. In light of that acknowledgement, it is difficult to fathom how the First Circuit could have ruled *ipse dixit* against plaintiffs. As this Court has held, the First Amendment plainly does not permit government to restrict speech in an attempt to indirectly influence conduct, when it has yet to take the step of directly regulating that conduct. *Rubin*, 514 U.S. at 489-91. Because the First Circuit failed to hold the Attorney General to his constitutional burden of proof, its decision upholding the Massachusetts regulations should be reversed.

CONCLUSION

The Massachusetts regulations impose a content-based restriction on speech. Such restrictions are presumptively invalid because they do not fall within any of the limited exceptions to the First Amendment. The court of appeals erred by concluding that government has greater leeway to restrict speech when it seeks to protect children. If the court had applied the appropriate level of First Amendment scrutiny, it could not have ruled in the government's favor. The decision of the court of appeals should be reversed and judgment should be entered in favor of plaintiffs or, at a minimum, the case should be remanded with instructions to apply full First Amendment scrutiny to the restrictions.

Respectfully submitted,

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Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., et al.,

Petitioners,

v.

THOMAS F. REILLY,
ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 129 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 525 briefs as amicus curiae in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. A list of PLAC's corporate members is attached as Appendix A.

PLAC's members include manufacturers of a wide variety of products, including tobacco products, pharmaceuticals, medical devices, pesticides, aircraft, motor vehicles, and chemicals, which are governed by comprehensive federal safety regulations and statutes. Most of those statutes have preemption clauses. PLAC and its members accordingly have a strong interest in assuring the consistent and proper resolution of federal preemption issues. Consequently, PLAC submits this brief to

assist the Court in resolving the preemption issue in this case.[1]

SUMMARY OF ARGUMENT

The First Circuit acknowledged that a "literal reading" of the broad language Congress used in the preemption clause of the Federal Cigarette Labeling and Advertising Act (FCLAA) "would preempt a range of state regulation," including the regulation at issue here. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 39 (1st Cir. 2000). The Court, however, refused to give force to the plain language of the clause, calling respect for Congress's plain words "uncritical literalism." But judges are not literary critics. They are supposed to implement Congressional directives, not critique, much less reconstruct, them.

The decision below turns the law on its head. It holds that presumptions trump plain language, that the more sweeping the preemption clause the more latitude a court has to narrow it, with the result that a law broadened in 1969 is read to revert to its narrower incarnation in 1965. The interpretation – a tortured rule that "with respect to cigarette advertising" really means "with respect to the content but not the location of cigarette advertising" –

[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by PLAC and was written entirely by its counsel.

undermines Congress's stated purposes behind the FCLAA, which the First Circuit set out to serve.

The lesson of the Court of Appeals' decision is that courts should not be free to retool federal law they don't like, in the name of presumptions or policy. The Court should make clear that courts must give Congress's chosen words their usual meaning, apply them according to their plain terms, and cannot use presumptions (or any other artifice) as a license to second-guess Congress's chosen means to achieving its stated ends.

ARGUMENT

I. PLAIN MEANING TRUMPS PRESUMPTIONS, NOT VICE VERSA.

"Pre-emption fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (Congressional intent is the "ultimate touchstone" of preemption analysis). Congress's express preemptive intent is gauged first, and best, by Congress's own words. "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

Those words, when clear, are the end of the matter. When Congress includes in a statute a provision explicitly setting forth its preemptive intent, the scope of the statute's express preemption is "governed entirely by

[that] express language."[2] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). When courts examine Congress's words, they must "assum[e] that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990). "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Thus, where language is plain, courts must give it full force, and have no business changing its plain meaning by looking to extrinsic aids, whether rules of construction or study of Congressional intent or presumptions. As Justice Scalia put it, the Court's "job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (concurring in part and dissenting in part).

Those are bedrock principles, essential to the fair and consistent application of the law. And this Court has applied them with respect to the very preemption clause

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[2] As this Court made clear in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1919 (2000), this principle governs the force to be given an express preemption clause, but an express preemption provision "does not bar the ordinary working of conflict pre-emption principles." *See also Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (holding "without merit" proposition that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute").

in the very Act at issue here.[3] In *Cipollone*, this Court held that when Congress chooses broad and general language to describe the state law prohibited, that language must be given full force. It explained that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law." 505 U.S. at 521. The Court reasoned that, since state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," the preemption clause's broad language encompassed common-law actions, even though the clause did not expressly mention common law. *Id.*

The Court rejected efforts to read the phrases "requirement or prohibition" and "state law" narrowly. It pointed out that the preemption clause's language departed from, and expanded, the scope of the earlier clause. Whereas the 1965 Act had barred state-required "statements," the 1969 Act "reaches beyond statements" and broadly barred "[o]bligations 'with respect to the advertising or promotion' of cigarettes." 505 U.S. at 520. The 1969 Act, the Court held, "worked substantial changes in wording," and "altere[ed] the reach" of the preemption clause. *Id.* at 520-21.

The Court thus rejected the use of the presumption against preemption to find ambiguity in plain language,

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[3] The FCLAA's preemption clause provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (West 2000).

or to narrow the language Congress used. To the contrary, the Court held "there is no good reason to believe that Congress meant less than what it said," *id.* at 522 (internal citations omitted), and it concluded that it must give effect to Congress's plain language.

The Court of Appeals in this case, however, turned the law on its head, and did the opposite of what *Cipollone* did with respect to the same section of the same statute. It began its preemption analysis not with the words of the statute, but with a presumption against preemption. The Court thus held that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 218 F.3d at 38 (quoting *Medtronic*, 518 U.S. at 484-86). The Court then used the presumption against preemption to avoid the literal meaning of unequivocal Congressional language.

The Court acknowledged that a "literal reading of that phrase would preempt a range of state regulation." *Reilly*, 218 F.3d at 39. But the Court imagined hypothetical laws not before it that might be in that range, speculated Congress would not have intended to preempt those hypothetical laws, and so refused to give plain language its plain meaning, holding that would be "hyper-literal" and "uncritical literalism." *Reilly*, 218 F.3d at 39, 40 (citing *Greater New York Metro. Food Council, Inc.*, 195 F.3d 100, 105 (2d Cir. 1999); and *Federation of Adver. Indus. Representatives, Inc. v. Chicago*, 189 F.3d 633, 637 (7th Cir. 1999)).[4]

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[4] The Seventh Circuit draws largely from *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514

The presumption against preemption, the Court held, "is particularly strong here" because the state regulations relate to areas of traditional state power like zoning and the welfare of minors. *Reilly*, 218 F.3d at 40. Accordingly, preemption language notwithstanding, Congress really meant "to give such traditional state laws 'wide berth.' " *Reilly*, 218 F.3d at 40 (quoting *Greater New York Metro. Food Council*, 195 F.3d at 110). The now-impregnable presumption must be brought to bear when "Congress speaks to [preemption] with generality." *Reilly*, 218 F.3d at 40 (quoting *Federation of Adver. Indus. Representatives, Inc.*, 189 F.3d at 637). The idea, apparently, is that when Congress acts where states have historically acted, the presumption overcomes Congress's language, and the broader the language Congress chooses to use, the more latitude a court has to use the presumption to limit it. As a result, a ban on "State law with respect to the advertising or promotion" of cigarettes, stated broadly and without limitation, was rewritten to bar only "State law that regulates content, but not any law relating to location or manner, of advertising or promotion" of cigarettes.

U.S. 645 (1995). *See Federation of Adver. Indus. Representatives, Inc.*, 189 F.3d at 637. But *Travelers* concerned ERISA, which has a different structure and history than FCLAA and indeed, an exception to a broad preemption clause for state regulation of insurance. *See* 29 U.S.C. § 1144(a), § 1144(b)(2)(A) (West 2000). Moreover, as *Travelers* (and past ERISA cases) makes clear, ERISA preempts even insurance laws that "*directly affect[ ]*" the ERISA plans sought to be protected from state regulation by the preemption clause. *Traveler's Ins.*, 514 U.S. at 657-58, 663. The regulation here "directly affects" cigarette advertising sought to be protected from state regulation by FCLAA's preemption clause.

That holding is jarring. It permits presumptions to create ambiguity where it does not exist, and then to rewrite and narrow plain and broad preemptive language. We respectfully submit it proves the folly of presumptions generally, and certainly the mischief they can make if not constrained.

A. There Should Be No Presumption Against Preemption In Interpreting Preemption Language.

PLAC respectfully submits that there is no basis for presumptions in any preemption analysis. Congressional intent is Congressional intent. It exists or it doesn't. Presumptions are fictions that do not help determine what Congress intended in any given statute.

Indeed, the use of the presumption has been anything but uniform. This Court has outright rejected any presumption against preemption in areas where Congress has traditionally regulated. *See United States v. Locke*, 529 U.S. 89, 108 (2000) ("an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."). In fact, this Court has suggested an opposite presumption – a "presumption of federal pre-emption, based on the primary jurisdiction rationale" – may apply in traditional federal spheres. *See Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984). As Justice Scalia observed in *Cipollone*, in many preemption cases the Court has "said not a word" about any presumption against preemption, even where

the federal law concerns matters states traditionally regulate.[5] 505 U.S. at 546. Yet in *Medtronic*, the plurality opinion made the presumption central to the preemption analysis, spawning confusion in the lower courts,[6] including the First Circuit in this case. *Medtronic*, 518 U.S. at 486-87. Presumptions that shift with inherently subjective characterizations of law,[7] do not apply consistently in any event, and ultimately are "artificial" (*Locke*, 529 U.S. at 108), ought not to apply at all.

The presumption against preemption also does not serve the federalism purpose that is its apparent source. PLAC does not dispute that state law is important, in spheres traditionally within state power and otherwise.

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[5] *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

[6] *Compare, e.g., Munroe v. Galati*, 938 P.2d 1114, 1120 (1997) (*Medtronic* presumption mandates reading of savings clause to foreclose implied preemption of "no airbag" claim), *with Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1919 (2000) ("no airbag" claim preempted despite savings clause); *see Shanklin v. Norfolk S. R.R. Co.*, 173 F.3d 386, 394 (6th Cir. 1999) (*Medtronic* presumption requires a narrow reading of preemption clause to foreclose preemption of inadequate railroad warnings claim), *rev'd*, 529 U.S. 344, 358-59 (2000) (inadequate railroad warning claim expressly preempted).

[7] The sphere in which a law operates can be in the eye of the beholder. For example, in this case, the state claims its law is a matter of zoning and public safety (traditional matters of local concern), but it could just as well be described as a law regulating commerce and speech (federal concerns).

But the importance of state law is irrelevant when federal supremacy is at stake. The " 'relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). That rule is nearly as old as the republic:

> [I]t will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of [the State] must yield to the law of Congress * * * .

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824). *Accord Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992) ("[u]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (internal quotation marks omitted, and citing with approval *Felder* and *Free*, and quoting *DeCanas v. Bica*, 424 U.S. 351, 357 (1976): "[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").[8]

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[8] The supremacy rule assumes, of course, that there is a valid constitutional basis for the federal law. *Cf. United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). The constitutionality of the FCLAA is not at issue in this case.

But if a presumption against preemption has some role to play in interpreting express preemption language, it must be a limited one if Congressional intent is to remain preemption's touchstone. It may aid in interpretation ***only*** where the statutory language is ambiguous and the statutory purpose regarding preemption is indeterminate, ***and*** where the circumstances suggest it would be inconsistent with Congressional intent to supersede state law. *See Cipollone*, 505 U.S. at 545 (opinion of Scalia, J., concurring in part and dissenting in part) (any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself"). In no event should presumptions be used as they were here: as a basis to find ambiguity in unambiguous language, and then as an excuse to change that unambiguous language by rewriting it to say something very different from what it says on its face. For a presumption that gives courts license to rewrite plain language based on their own sense of policy destroys the primacy of Congressional intent, and threatens the balance of powers essential to the federal system. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2092 (2000) (misuse of presumptions allows courts to "rewrite the laws enacted by Congress [and] disrupt the constitutional division of power between federal and state governments").

The "interpretation" of the law in this case proves the point.

B. Congress's Plain Language Should Be Respected Here.

Cipollone should have been a roadmap here. It held that this very clause's language is clear and broad, that its amendment history underscored that the broad language was chosen advisedly, and that no presumption permitted the broad language to be narrowed.

The language at issue here is equally broad and equally clear. Just as the phrase "no requirement or prohibition sweeps broadly" is unequivocal and does not permit limitations, the phrase at issue here does too. "With respect to the advertising or promotion of" cigarettes is plain and broad, and does not permit limitations, much less content-but-not-location limitations.

Indeed, the amendment history that forbade a narrow reading in *Cipollone* is at least as strong a bar to creative writing here. The earlier 1965 Act had a narrower preemption clause that said "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes. . . . " *Cipollone*, 505 U.S. at 514 (quoting Pub. L. 89-92, 79 Stat. 282, § 5(b), as amended, 15 U.S.C. §§ 1331-1340). It thus spoke in narrow terms to required "statements in advertising" – content. The 1969 Act broadened that aspect of the preemption clause just as it broadened the meaning of state law. As *Cipollone* put it, "the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising and promotion' of cigarettes." 505 U.S. at 520 (plurality). The Court of Appeals' decision ignores the change from 1965 to 1969, and essentially reverts the preemption clause to its 1965 incarnation.

The Court of Appeals reasoned its rewriting of the preemption clause served what it believed was Congress's intent. Even were resort to legislative history a valid way to discern intent from plain language, the Court's selective reading of history lost sight of Congress's real purposes in preempting state cigarette-advertising law.

The Senate Report accompanying the FCLAA explained the Act's express preemption provision should "in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, *or similar police regulations*. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663 (emphasis supplied).

The Court of Appeals followed a decision of the Seventh Circuit that seized on the first part – the reference to "similar police regulations" – as evidence that Congress meant to preserve matters of "traditional local concern" like the "placement and manner of outdoor advertising." *Federation of Adver. Indus. Representatives*, 189 F.3d at 639; *see also Reilly*, 218 F.3d at 40; *Greater New York Metro. Food Council*, 195 F.3d at 110. But that overlooks the sentence that follows. It makes clear that while states are free to exercise some traditional police powers (taxation, sales, or building air regulations), it cannot regulate advertising.

The purpose for that bar is in the statute itself. Congress enacted the FCLAA to protect "commerce and the national economy" by ensuring that it is "not impeded by

diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2) (West 2000). As the Ninth Circuit recognized, allowing "every board of health, city, county, and state in this country [to] regulate[ ] the location of tobacco advertisements" is exactly the kind of regulation that would "frustrate" the purpose of the FCLAA by "imped[ing]" the national economy. *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1074 (9th Cir. 1999).

The First Circuit admitted as much; upholding these regulations, it acknowledged, "may create . . . diverse, nonuniform, and confusing advertising standards" like those condemned in the FCLAA. *Reilly*, 218 F.3d at 41 (internal quotation marks omitted). It dismissed the problem, however, reasoning these are not "the kind of" conflicting standards that concerned Congress. "[D]ivergent" tobacco advertising restrictions "are indistinguishable from the existing zoning regulations in place throughout the country." *Id.* at 41. Since tobacco advertisers must already consult local zoning regulations to determine how to bring their advertisements into compliance, the Court here (*id.* at 41), like the Second Circuit, saw "no reason to treat the location restrictions before us any differently." *Greater New York Metro. Food Council*, 195 F.3d at 109.

With all due respect to the First Circuit, it misunderstands the problem Congress sought to avert. The preemption clause does not concern itself with zoning regulations of general application. It speaks to cigarette-specific prohibitions or requirements "based on smoking and health." It thus makes exactly the distinction the First

Circuit rejects: it permits states to have zoning regulations governing all advertising based on whatever concerns govern such decisions generally, but it forbids "prohibitions" or "requirements" that single out cigarette advertising or promotion "based on smoking and health."

Congress made that distinction for good and clear reasons. Congress preempted state and local regulations "to avoid the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566, *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. Such chaos, Congress judged, would "impede" national commerce, thus subverting FCLAA's crucial economic goals. *See* 15 U.S.C. § 1331(2). This judgment was Congress's prerogative to make, based on its concern for the consequences of local and diverse advertising regulations on interstate commerce in an important industry.

To illustrate the problem if the preemption clause were rewritten as the First Circuit proposes, imagine a tobacco advertiser hoping to promote its product in California.

California state law permits billboards and signs anywhere beyond a 1,000-foot radius of public playgrounds and all public or private elementary, junior, and high schools. *See* CAL. BUS. & PROF. CODE § 22961(a) (West 2000). Some local ordinances, however, require the advertising ban around schools to extend further geographically, or to apply to a larger number of schools. For example, billboards in Berkeley must be located at least 1,400 feet from "any" school. *See* BERKELEY, CAL., CODE § 20.66.030 (1998). That would appear to include post-secondary schools not included in the state law. In Brentwood, the

prohibited area stretches to 1,600 feet, but only around elementary and secondary schools. *See* BRENTWOOD, CAL., CODE § 8.36.020 (2000).

Some city ordinances ban tobacco advertising around other types of places or institutions. Los Angeles bans advertising within a 1,000-foot radius of residential zones, religious institutions, entertainment parks, youth centers, public parks, or playgrounds, but only if the advertisements would be publicly visible. *See, e.g.*, LOS ANGELES, CAL., CODE ch. IV, art. 5.2.5, § 45.22(A) (1998). Other cities ban advertisements outright "in publicly visible locations." OAKLAND, CAL., CODE tit. 14, ch. 14.04.280 § 1602 (1998). National City apparently *permits* tobacco advertising around schools (so only the state law would operate there), unless that tobacco advertising is located "within two feet of any candy, snack, or non-alcoholic beverage display inside stores or businesses that are located within one thousand feet of schools, playgrounds, or playing fields." NATIONAL CITY, CAL., CODE tit. 9, ch. 9.38.040(b) (2000).

Then there are the exceptions to the rules. In Oakland, for example, the advertiser could place a billboard where it is "publicly visible" *if* it is placed on property designated "Business Mix" according to a local land use plan, *and* it is within a geographical area bound by certain specified streets within the Central Business District. However, that exception will not apply if it is within a 1,000-foot radius of, among other things, schools and places of worship. *See* OAKLAND, CAL., CODE § 1603(a)(1). Additionally, the advertiser could post a billboard inside a stadium, arena, or amphitheater within a restricted zone in Los Angeles so long as it is not visible from the

outside of the building. *See* LOS ANGELES, CAL., CODE § 45.23(E). Of course, if the advertiser did choose to advertise in a stadium in Los Angeles, he would still need to ensure that it did not run afoul of the state's prohibitions relating to schools and public playgrounds.

This glut of conflicting regulations comes from just four tobacco-specific provisions from four local tobacco ordinances in one state. Many other communities in California and across the country have enacted their own idiosyncratic tobacco-specific advertising restrictions.[9]

It may be that some advertiser would have the resources and stamina to determine every state and local cigarette advertising ordinance, reconcile conflicting rules of overlapping state, county, and local regulatory authorities where possible, locate every school (and religious institution and park and Coke machine and whatever else) and measure the conflicting distances, and then apply the exceptions, and then advertise its product in whatever space (if any) is left. But more likely – and what in truth the state regulators intend – the advertiser will simply give up and not advertise cigarettes. Congress clearly forbade state laws banning cigarette advertising. Why, in an Act expressly intended to protect "commerce and the national economy" by ensuring that it is "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations" (15 U.S.C. § 1331(2)

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[9] *See, e.g.*, ANTIOCH, CAL., CODE tit. 9, ch. 5, art. 5, § 9-5.519 (1999); SAN DIEGO, CAL., CODE art. 8, Div. 3, § 58.0303 (1998); DENVER, COLO., CODE tit. II, ch. 24, art. 1, div. 1, § 24-14.5 (1998); ATLANTIC CITY, N.J., CODE part II, ch. 208, art. I, § 208-1 (1998).

(West 2000)), would Congress allow "this kind of" regulatory chaos that has the same effect?

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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Porsche Cars North America, Inc.

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Raymond Corporation, The

Raytheon Aircraft Company

Rheem Manufacturing

RHI Refractories America

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

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TRW Inc.

UST (U.S. Tobacco)

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Visteon Corporation

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

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Whirlpool Corporation

Wilbur-Ellis Company

Wilson Trailer Company

Yamaha Motor Corporation, U.S.A.

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In The

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A., INC., ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE NEWSPAPER ASSOCIATION OF AMERICA, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, DOW JONES & COMPANY, INC., MAGAZINE PUBLISHERS OF AMERICA, INC., and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici Curiae are newspaper and magazine publishers, journalists and citizens with a deep commitment to the values of free speech.[1] They support substantial constitutional protection for commercial speech because advertising is both valuable speech in its own right, and a primary source of revenue enabling the nation's media to report news and disseminate other forms of speech universally recognized as vital to a fully-informed public and a functioning democracy. *Amici* also recognize that the values of free speech require unwavering support for the First Amendment rights of all speakers, including advertisers, even in cases where *amici* might disagree with the message being conveyed.

This is such a case. *Amici* do not condone the marketing practices of the tobacco industry. Indeed, *amici* include among their members publications that refuse to carry tobacco advertising. *Amici* also recognize the significant public health threat posed by tobacco use, and the interest the government has in reducing the incidence of youth smoking. But the First Amendment demands vigilance in protecting the rights of all speakers – including, and perhaps especially, the rights of unpopular speakers – against overreaching by government regulators. This Court's commercial speech jurisprudence requires that, no matter how justified the end, speech restrictions can be used, if ever, only as the regulatory tool of last resort.

Thus, *amici*'s interest in this proceeding, first and foremost, is that they support full protection under the First Amendment for the marketplace of ideas in which citizens are free to receive information and make their

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[1] Written consent of all parties to the filing of this *amicus* brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support. Individual *amici* are described further in the Appendix to this brief.

own informed decisions. America's media are active participants in that marketplace as speakers, as the means by which other speakers may be heard, and as a primary vehicle by which citizens receive information they need to participate effectively in public and private decision-making.

Second, *amici* support constitutional protection for commercial speech as an important part of the marketplace of ideas, and specifically the unimpeded flow of truthful, nonmisleading speech about lawful products. The media link speakers (including advertisers) and their audience (including consumers), and the First Amendment fosters the interests of both: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976). Moreover, as this Court has recognized, a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

Third, advertising revenues enable the media to gather and report news, comment on political and other public events, and disseminate other forms of speech vital to the proper functioning of our democratic form of government. *Amici* are active participants in speech at the core of the First Amendment, but can remain so only because of the fundamental financial support provided by advertising. Restrictions on advertising undermine not only the market for the particular targeted product, but also the broader "marketplace of ideas" promoted by a viable, self-sustaining press.

Amici thus believe strongly that governmental efforts to advance policy goals by suppressing truthful, nonmisleading advertising must be subject to vigilant judicial scrutiny. The lower courts here inadequately performed this role, analyzing the Massachusetts regulations in a manner far too solicitous of the government. The courts

failed to hold the government to the First Amendment burden mandated by this Court's commercial speech jurisprudence. The First Circuit's decision, if allowed to stand, would permit curbs on speech without ***any*** evidentiary hearing, much less a weighing of the competing evidence, and without any searching inquiry of the effectiveness of alternative approaches that do not encroach on speech. The First Amendment requires far more.

SUMMARY OF ARGUMENT

In its recent commercial speech cases, this Court has emphasized the heavy burden the government bears, under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), to justify restrictions on truthful, non-misleading advertising. Although they would welcome the strict-scrutiny test called for by petitioners, *amici* believe *Central Hudson*, properly applied, easily mandates reversal of the decision below.

First, commercial speech is highly valued under the First Amendment for both its informational and expressive elements. Truthful advertising for legal products, even for disfavored products, is protected speech and may only be restricted in very narrow circumstances. This Court's recent commercial speech cases establish that the government bears a heavy burden to justify regulations on commercial speech, and that lower courts must be vigilant in holding the government to this burden.

Second, to satisfy *Central Hudson*'s requirement that an advertising restriction "directly advances" a substantial interest, the government must present admissible evidence and prove the regulation in fact serves the asserted goal. Here, the First Circuit upheld far-reaching restrictions on tobacco advertising based in part on a presumed link between tobacco advertising and tobacco use by minors – a type of presumption this Court has rejected as part of the *Central Hudson* analysis. Moreover, the courts

below failed to require the Attorney General to prove in fact that the regulations were effective. This Court should make clear that, when faced with competing evidence regarding the effectiveness of a commercial speech regulation, the trial court must (1) weigh the evidence and make factual findings; (2) demand that the government prove its case by at least a preponderance of the evidence; and (3) assure that evidence offered to show the link between advertising and the state interest meets normal standards of admissibility – meaning, in the case of scientific evidence, that it is both reliable and relevant.

Third, this Court should invalidate the Massachusetts regulations because the Attorney General has failed to show they are narrowly tailored to serve the asserted interest in reducing youth tobacco use. The ban on advertising within 1,000 feet of a school or playground was not carefully calculated, and impacts far more speech than necessary. Numerous equally effective alternatives exist that would impose less, or no, burden on petitioners' speech.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH.

This Court repeatedly has stressed the value and significance of commercial speech since specifically extending First Amendment protection to advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Commercial speech is worthy of protection for many of the same reasons that other forms of speech are protected:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at

> what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id. at 765 (citations omitted); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (commercial messages historically played "a central role in public life"). Commercial speech, like other speech protected by the First Amendment, is valued not only for the factual information it may convey, but also for the images and values it may express. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).[2]

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[2] The First Circuit ignored these principles when it suggested that "tombstone" signs containing bare factual information could "alleviat[e]" the Massachusetts regulations' restrictions on other types of expression. 218 F.3d 30, 52. First Amendment protection for commercial speech is not limited to purely factual expression, however. So-called "image advertising" is equally valued. "Although public discourse includes specific debates about potential policy decisions, it is also an arena suffused with intense and contentious articulations of collective identity. Within public discourse,

For two decades, this Court has evaluated commercial speech restrictions under the four-part test set forth in *Central Hudson*. That test asks, first, whether the speech at issue concerns a lawful activity and is not misleading. If so, the restriction is permissible only if the government interest is substantial; the regulation directly advances the asserted interest; and the restriction is not more extensive than is necessary to further the interest. *Central Hudson*, 447 U.S. at 566. Earlier cases did not always apply these requirements in a strict fashion, and sometimes deferred to unsupported arguments that the government's interests were substantial and its chosen remedy effective. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding ban on locally directed advertisements for casino gambling based on suppositions as to legislative preferences). Perhaps for this reason, *Central Hudson* has been criticized as not sufficiently "straightforward and stringent." *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 184 (1999). Nonetheless, the Court has adhered to *Central Hudson* – and, in its most recent commercial speech cases, has committed to applying it with increasing vigor, particularly as to the third (direct and material advancement) and fourth (narrow

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heterogeneous and conflicting visions of national identity continuously collide and reconcile. These visions may or may not have immediate policy implications, but they are nevertheless highly significant for the general orientation of the nation. Visions of the good life articulated within commercial advertisements are relevant to this process. Any observer of the American scene would report that advertising deeply influences our sense of ourselves as a nation." Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L.Rev. 1, 11 (October 2000).

tailoring) prongs of the test. Under the recent cases, it is clear that the government bears a substantial factual burden to justify the particular restrictions imposed. *See Greater New Orleans*, 527 U.S. 173 (ban on broadcast advertising of private casino gambling unconstitutional under *Central Hudson*); *44 Liquormart, Inc.*, 517 U.S. 484 (1996) (ban on liquor price advertising failed under third and fourth prongs of *Central Hudson* test); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking prohibition on listing alcohol content on beer labels).

The stringent application of *Central Hudson* required by these cases has at least two facets of particular relevance here. First, the First Amendment scrutiny of advertising restrictions is no less demanding when the commercial speech at issue involves so-called "vice" activities that the government wishes to curtail. As Justice Stevens stated in *44 Liquormart*, "[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity,' " and "recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice." 517 U.S. at 515 (Stevens, J., plurality op.). In *Greater New Orleans*, the Court characterized *44 Liquormart* and *Rubin* as having "rejected the argument" that the government's power to prohibit a disfavored activity included the power to permit the activity but restrict advertising about it. *Greater New Orleans*, 527 U.S. at 182.

This emphatic rejection of any "vice exception" to *Central Hudson* comports with the well-recognized principle that courts must be vigorous in upholding First

Amendment rights of unpopular speakers. Throughout our history unpopular speech has served as a catalyst for wide protection of all citizens' rights to freedom of speech, and as a test of this nation's commitment to freedom of expression. *See, e.g., Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). One need not approve of the content of advertisements promulgated by tobacco companies to recognize that their right to express those messages must be protected under the same stringent constitutional framework that is applied to all forms of advertising for lawful products.

A second notable facet of the recent commercial speech cases is their recognition that courts must engage in a searching inquiry when evaluating advertising restrictions. Under *Central Hudson*, the government bears a substantial factual burden to demonstrate, with concrete and admissible evidence, that its regulations advance its asserted interest to a direct and material degree; the government's burden is not satisfied by mere speculation or even a reasonable belief that banning advertising will achieve the desired goal. *E.g., Rubin*, 514 U.S. at 487. As discussed more fully in section II.A, the courts in this case failed to hold the government to its burden, relying instead on impermissible deference to the presumed "reasonableness" of the regulations, and an inadequately examined evidentiary record. The First Circuit's resistance to employing the necessary inquiry demonstrates the need, yet again, for this Court to

instruct the lower courts that they may not rely on discredited modes of analysis, but instead must actively weigh the evidence in reviewing First Amendment challenges to commercial speech restrictions.

II. THE COURTS BELOW FAILED TO HOLD THE STATE TO ITS BURDEN OF PROVING THE CONSTITUTIONAL PERMISSIBILITY OF THE ADVERTISING REGULATIONS.

The First Circuit decision cannot be reconciled with the *Central Hudson* test, as interpreted and applied in this Court's recent commercial speech cases. Petitioners ask this Court to adopt a standard of review more stringent than *Central Hudson*. *Amici* would welcome this development, but do not believe it is necessary in order to decide this case. The decision below must be reversed because the First Circuit failed to hold the government to its burden, under the *Central Hudson* test, of providing concrete, empirical evidence that the Massachusetts regulations "directly and materially advance the asserted governmental interest," and are "not more extensive than necessary to serve the interests that support" them.[3] *Greater New Orleans*, 527 U.S. at 188.

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[3] The first prong of *Central Hudson* is not at issue: the Attorney General assumed below that petitioners' advertising is truthful, nonmisleading and involves a lawful activity. 218 F.3d at 43. *Amici* also do not dispute that the Attorney General's asserted interest of reducing tobacco use by minors is "substantial," and thus satisfies *Central Hudson*'s second prong.

A. The Government Must Establish that Its Commercial Speech Restrictions in Fact Directly Advance Its Asserted Interest in a Material Way.

This Court has made abundantly clear that the third *Central Hudson* factor imposes on the government a heavy burden of ***proving*** – through admissible evidence, as opposed to presumptions, speculation, or conjecture – that any restriction on commercial speech directly advances the asserted governmental interest in a material way.

> [T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."

Rubin, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 770-71). "[T]his requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.' " *Greater New Orleans*, 527 U.S. at 188 (quoting *Edenfield*, 507 U.S. at 771).

The courts below recited these standards, but utterly failed to apply them. The First Circuit upheld the Massachusetts regulations based, first, on so-called "common sense" presumptions that restricting advertising about tobacco products will decrease tobacco use by minors – ignoring this Court's recent and thorough discrediting of such presumptions as a means by which the government may satisfy its burden under part three of *Central Hudson*. The regulations also supposedly were upheld in light of

evidence submitted by the Attorney General. Both the First Circuit and the district court, however, failed to evaluate the reliability and admissibility of this evidence, and failed to weigh it against the contrary evidence submitted by petitioners. The lower courts permitted the Attorney General to meet his "burden" of proving direct and material advancement without holding him to ***any*** burden of proof – not even a preponderance of the evidence.

1. The Government Cannot Rely on Presumptions To Satisfy Its Burden of Proof.

In analyzing whether Massachusetts' far-reaching restrictions on tobacco advertising directly and materially advanced the state's asserted interest in reducing youth tobacco use, the First Circuit relied first and foremost on the Attorney General's "common sense" assertion that "advertising has some cause-effect relationship with consumption . . . " *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 48 (1st Cir. 2000). According to the First Circuit, the amount of money cigarette manufacturers "pour" into advertising indicates the manufacturers' belief that advertising has a "substantial effect on consumption of their product," and thus, that restricting tobacco advertising would reduce overall demand and, presumably, demand among youth. *Id.* This precise reasoning has been rejected in the Court's recent commercial speech cases, which hold that such presumptions about the alleged link between advertising and consumption do not serve as proof of "direct advancement."

The First Circuit cited *Central Hudson* itself for the presumption that "there is an immediate connection between advertising and demand." 218 F.3d at 48 (citing

Central Hudson, 447 U.S. at 569). The First Circuit, however, ignored the context in which *Central Hudson* arose. *Central Hudson* involved a monopoly provider of electricity seeking to engage in promotional advertising – that is, "advertising intended to stimulate the purchase of utility services." 447 U.S. at 559. By definition, there was a plausible connection between such advertising and the consumption of electricity: only one source existed for such electricity, and thus any increase in Central Hudson's sales necessarily would increase overall consumption.

This monopoly-specific concept lost its moorings in *Posadas*, in which the Court upheld an advertising restriction based on deference to an unstated and unsupported legislative belief that "advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Posadas*, 478 U.S. at 342. Suddenly, and without analysis, the link between advertising and consumption in a ***monopoly*** market became applicable to advertising in a ***competitive*** market – and the link could be presumed without evidence. *Posadas* left no room for a fundamental principle of marketing: that advertising in a competitive market might serve not to increase overall demand, but rather to solidify brand loyalty or to increase the advertiser's market share at the expense of competitors.

This Court has since disavowed *Posadas*, and with it the deference given to such presumptions.[4] The more

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[4] *E.g.*, *44 Liquormart*, 517 U.S. at 509 (Stevens, J., plurality op.) ("on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis"); *id.* at 531 (O'Connor, J., concurring) ("Since *Posadas* . . . this Court has examined more searchingly the State's professed goal, and the

recent cases recognize the reality that advertising often serves not necessarily to stimulate new demand, but to obtain a greater share of the existing demand. In *Greater New Orleans*, the government had argued that "promotional" advertising for casino gambling increased gambling, particularly among compulsive gamblers thought to be more "susceptible" to such advertising, and thus that banning broadcast advertisements would reduce the social costs of gambling. The Court disagreed:

> Assuming the accuracy of this causal chain, it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another.

527 U.S. at 189. The purported "common sense" notion that some link exists between advertising and overall demand cannot substitute for proof that the particular restriction chosen by the government directly and materially serves the regulatory goal. *Id.*; *see also 44 Liquormart*, 517 U.S. at 505-06 (Stevens, J., plurality op.) (while ban on price advertising for alcohol "may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption"); *Rubin*, 514 U.S. at 487-88 (the "common sense" idea that "a restriction on the advertising of a product characteristic will decrease the extent to

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speech restrictions put into place to further it, before accepting a State's claim that the speech restriction satisfied First Amendment scrutiny.").

which consumers select a product on the basis of that trait" not sufficient to prove direct and material advancement of the asserted government interest).[5]

These cases closed what previously had been an avenue used frequently by the government to satisfy its *Central Hudson* burden – the presumption that less or no advertising in a particular medium must directly advance the government's interest in curbing consumption. The First Circuit, disregarding these roadblocks, ignored the possibility that tobacco manufacturers advertise to increase market share, not market-wide demand. It also ignored this Court's clear instruction that reliance on presumptions about the link between advertising and consumption, without reference to record evidence, have no place in the *Central Hudson* analysis.

2. The Courts Below Erred in Failing To Evaluate the Admissibility and Sufficiency of the State's Evidence.

Stripped of its impermissible reliance on presumptions, the First Circuit's conclusion that the Attorney General met his burden of showing "direct advancement" rests entirely on the "myriad sources" he submitted, some of which purport to show a causal link between tobacco advertising and tobacco use. 218 F.3d at 48. *Amici* do not

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[5] The First Circuit's citation (218 F.3d at 48) of *Rubin* as support for its finding that "common sense" supports the Attorney General's "direct advancement" burden cannot be squared with what *Rubin* actually says. *Rubin* ***rejected*** the government's argument that the alleged "common sense" link between a ban on displaying alcohol content on beer labels and consumer behavior was sufficient to further the government's asserted interest in preventing "strength wars" among beer producers. *Rubin*, 514 U.S. at 487-88.

here address the validity of the studies submitted by the government, nor attempt to weigh the government's evidence against the countervailing evidence offered by petitioners. They submit, however, that the ***court*** was obligated, and failed, to do so. The district court declined to consider petitioners' attacks on the validity of the Attorney General's evidence, finding that the "government is not required to satisfy the causal relationship [between advertising and reduced tobacco use] by a preponderance of the evidence." *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180, 188 (D. Mass. 2000). The First Circuit noted the volume of evidence submitted by the Attorney General – "[n]early two thousand pages . . . of reports and surveys by governmental, scientific, and academic entities," 218 F.3d at 48 – but it made no independent factual findings. In effect, these courts held that an unexamined record of unverified studies, with no evidentiary hearing and no attempt to determine whether advertising in fact causes youth smoking, is sufficient proof of direct and material advancement.

This Court's commercial speech jurisprudence requires a greater degree of judicial vigilance and oversight than the courts below provided. Absent meaningful review, the Attorney General's studies are just so much paper. To defend a restriction on commercial speech, a governmental entity must prove "that the harms it recites are real and that its restrictions will ***in fact*** alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71 (emphasis added). This is only possible if three things happen. First, the court must make factual findings, after evaluating the government's evidence independently and weighing it against any conflicting evidence. Second, the government must show direct and material advancement

by at least a preponderance of the evidence. Third, the admissibility of the evidence must be established.

First, reversal is required in this case because the courts below failed to hold an evidentiary hearing or weigh the competing evidence. The causal link between the advertising restriction and the asserted goal must be established as a factual matter. The court is obligated to evaluate the evidence independently – and not simply defer to the government's speculation or conjecture regarding the reasonableness of the restrictions. *Id; accord Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 143 (1994). In other First Amendment contexts, this Court has emphasized the need for "independent judgment of the facts bearing on an issue of constitutional law." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J., plurality op.) (quoting *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989)). *Turner* involved a challenge to regulations requiring cable systems to carry local broadcast signals. Remanding the case for additional judicial findings of fact, the Court stated:

> [U]nless we know the extent to which the must-carry provisions ***in fact*** interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. Finally, the record fails to provide any ***judicial findings*** concerning the availability and efficacy of "constitutionally acceptable less restrictive means" of achieving the Government's asserted interests.

Id. at 667 (emphasis added, citation omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) and *Sable*, 492 U.S. at 129)). Similarly, the Court last term relied on a district court's detailed factual findings to

strike down restrictions on sexually-oriented cable television programming. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878 (2000). The government asserted the restrictions were necessary to combat the problem of "signal bleeding" in scrambled programming; the district court found as a factual matter, and this Court affirmed, that the government's evidence contained no hard proof that the problem was widespread. 120 S.Ct. at 1889-90 ("When First Amendment compliance is the point to be proved, the risk of non-persuasion – operative in all trials – must rest with the Government, not with the citizen. . . . Unless the District Court's findings are clearly erroneous, the tie goes to free expression.").

This Court's recent commercial cases confirm the need for judicial fact-finding as to whether the challenged restriction directly advances the government's interest in a material way. *See 44 Liquormart*, at 517 U.S. at 505-06 & n.17 (Stevens, J., plurality op.) (rejecting government speculation, in face of contrary evidence, that ban on price advertising furthered asserted interest); *Rubin*, 514 U.S. at 490 ("anecdotal evidence and educated guesses" held insufficient to overcome "the weight of the record"); *Edenfield*, 507 U.S. at 770-71. In *Greater New Orleans*, the government regulator itself recognized the need, after *Rubin* and *44 Liquormart*, to factually connect the casino advertising ban to a reduction in gambling: the FCC proposed, as an alternative to finding the statute unconstitutional, that the case be remanded to permit it to "build a record" of more fully developed facts showing the statute's effectiveness. 527 U.S. at 189 & n.6.[6]

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[6] This Court declined the FCC's invitation – not because further facts were unnecessary, but because even a more fully developed record would have been insufficient to demonstrate the effectiveness of the advertising ban in light of the many

The courts below failed to engage in the requisite judicial fact-finding regarding the Massachusetts regulations. Most glaringly, the district court – the appropriate place to determine, in the first instance, whether the regulations in fact directly advance the government's asserted interest – flatly refused to consider the petitioners' "challenge [to] the sufficiency of the Attorney General's showing. . . . " 84 F. Supp. 2d at 187. In response to petitioners' "challenge to the accuracy or conclusions of the studies" purporting to show the link between underage smoking and advertising, the court found that "[t]he government is not required to satisfy the causal relationship by a preponderance of the evidence. . . . 'Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation.' " *Id.* at 188 (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1313 (4th Cir. 1995), *vacated*, 517 U.S. 1206 (1996)).[7]

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statutory exceptions. 527 U.S. at 189 & n.6 (also noting government had been given "ample opportunity to enter the materials it thought relevant" after prior remand).

[7] The district court also relied on *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated*, 518 U.S. 1030 (1996). 84 F. Supp. 2d at 188-89. Both Fourth Circuit opinions relied heavily on *Posadas* and its now-discredited deference to the allegedly reasonable belief of legislative bodies. This Court remanded both cases for reconsideration in light of *44 Liquormart*; in both instances the Fourth Circuit affirmed. *Penn Advertising*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Anheuser-Busch*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). *Amici* believe the Fourth Circuit cases on which the district court

The district court's refusal to weigh the competing evidence was not corrected by the First Circuit. Like the district court, the First Circuit too declined to engage in the necessary judicial fact-finding regarding the efficacy of Massachusetts' advertising restrictions. The First Circuit relied on *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) to justify reliance on anecdotal evidence and unexamined studies in lieu of a careful weighing of the conflicting evidence. 218 F.3d at 46. But *Florida Bar* is distinguishable: there, the evidentiary record mustered by the state in support of a restriction on attorney solicitations "was noteworthy for its breadth and detail," and was "at no time refuted, save by the conclusory assertions that the Rule lacked 'any factual basis.' " 515 U.S. at 627-28. The instant case involves a vigorously disputed record: the Attorney General's evidence was directly challenged by evidence showing "no correlation or causal relationship . . . between advertising and tobacco use." 218 F.3d at 48, n.10.[8] The courts below simply ignored the weight of this Court's authority – which, as discussed

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relied, like *Posadas*, "erroneously performed the First Amendment analysis." *44 Liquormart*, 517 U.S. at 509 (Stevens, J., plurality op.).

[8] Additionally, as Justice Thomas has observed, this Court's decisions support unfettered "dissemination of information about commercial choices in a market economy." The occasional departures from strict application of this principle have come in cases in which the government's interest was in ensuring consumer protection against fraud or overreaching, rather than indirect regulation of the underlying activity. *44 Liquormart*, 517 U.S. at 520-21. (Thomas, J., concurring). *Florida Bar* was such a case, implicating the government's interest in protecting consumers from overreaching attorneys. Here, in contrast, the government admittedly is interested in altering behavior.

above, requires a searching inquiry of the evidence of the sort not performed here.

The First Circuit gave extensive attention to studies showing the health risks posed by youth smoking. 218 F.3d at 44-47. But *Central Hudson*, properly applied, requires the Attorney General to show not just that tobacco use is harmful to minors; he must show that the advertising restrictions actually do something to materially alleviate the problem. The court relegated this crucial First Amendment inquiry to a footnote: it recognized the competing evidence regarding the link between advertising and use, but held that "the fact that there may exist differences of opinion on this issue is insufficient to deprive Massachusetts of its ability to enact regulations based on a well-founded conclusion that advertising restrictions will reduce tobacco use among young people." *Id.* at 48 n.10. The court misperceived its duties: where speech rights are at issue, a mere "well-founded" belief is insufficient, and "differences of opinion" must be tested in court, by a weighing of the evidence.

Moreover, the evidence the First Circuit does discuss appears to relate only to cigarette advertising, yet is used as evidence justifying advertising restrictions on other forms of tobacco. *Id.* at 48-49. Most strikingly, the court found that with respect to cigars, outdoor advertising of the sort targeted by the Massachusetts regulations was "nearly nonexistent." It would seem to follow that any direct advancement of the Attorney General's asserted interest would be *de minimis* at best, and certainly not advancement "in a material way," sufficient to overcome the First Amendment rights of the cigar manufacturers. *See 44 Liquormart*, at 517 U.S. at 506.

Second, this Court should make clear that the government must prove direct and material advancement of its

interest by ***at least*** a preponderance of the evidence. As stated above, the district court expressly held that "[t]he government is not required to satisfy the causal relationship [between the advertising prohibition and curbs in youth smoking] by a preponderance of the evidence," because, in its view, the *Central Hudson* inquiry seeks merely to elicit whether lawmakers reasonably could have concluded the regulation would be effective. 84 F. Supp. 2d at 188. This is plainly erroneous.

This Court has never explicitly determined the evidentiary standard the government must satisfy to prove direct advancement. In other First Amendment contexts, the Court has held that limitations on speech rights must be justified by "convincing clarity." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (public officials claiming defamation must prove actual malice by clear and convincing evidence); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (same standard applies on summary judgment).[9] But even if a heightened standard of proof is not required, it is well established that "the Government carries the burden of showing" direct and material advancement. *Rubin*, 514 U.S. at 487; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). It follows that the government must prove the link between its interest and its speech restriction by at least a preponderance of the evidence; otherwise, the "burden" is no burden at all. Under the reasoning of the courts below, commercial speech bans could be upheld even if the

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[9] *See Addington v. Texas*, 441 U.S. 418, 424 (1979) (clear and convincing standard used where "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money," and "to protect particularly important individual interests in various civil cases.").

evidence shows it is more likely than not that the restriction ***fails*** to directly advance the government's interest, so long as the government reasonably believes it to be effective. An inquiry that defers to reasonable legislative belief amounts to mere rational-basis review, and is wholly at odds with the First Amendment protection this Court has granted to commercial speech.

Third, and finally, the courts below erred by failing to consider the admissibility of the evidence before it. The First Circuit did not expressly address this issue; the district court held that the government could satisfy the *Central Hudson* test even with normally ***inadmissible*** evidence because its burden was to show only that it had "a logical belief, when it crafted the regulation, that its regulation would directly advance its purpose." 84 F. Supp. 2d at 187-88 (citing *Penn Advertising*, 63 F.3d at 1323). As discussed previously, this Court has squarely rejected this kind of deference to putative legislative belief. The issue under *Central Hudson* is not whether the legislature rationally could have believed its regulation would be effective. Rather, the issue is whether, ***in fact***, the restriction directly advances the regulatory end. *Edenfield*, 507 U.S. at 770-71. It follows that where, as here, scientific studies and surveys are relied on to establish this fact, their admissibility and credibility should be evaluated under normal evidentiary standards. At a minimum, a district court must assure that scientific or other specialized testimony is both relevant and scientifically reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). A party may not rely on scientific evidence unless it is sufficient to support the conclusions for which it is offered. *General Electric Company v. Joiner*, 522 U.S. 136 (1997). Applied here, the

Attorney General cannot satisfy his burden to show direct advancement merely by submitting scientific "evidence" the admissibility of which has never been evaluated. Nor can he rely on studies that address only the health risks of youth smoking without reference to the role, if any, played by advertising. This Court should reverse, and make clear that scientific evidence offered as the factual basis for overcoming an advertiser's First Amendment rights must be reviewed for relevance and reliability.

B. Massachusetts Adopted Speech Regulations More Restrictive Than Necessary To Achieve Its Asserted Interest.

The fourth *Central Hudson* factor requires that the government prove that its restriction on speech is "no more extensive than necessary to serve the interests that supports it." *E.g., Greater New Orleans*, 527 U.S. at 188. In its recent cases, the Court has affirmed that the government must be put to its proof to demonstrate narrow tailoring between its means and its end:

> While the State need not employ the least restrictive means to accomplish its goal, the fit between means and end must be "narrowly tailored." The scope of the restriction on speech must be reasonably, though it need not be perfectly, targeted to address the harm intended to be regulated. The State's regulation must indicate a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

44 Liquormart, 517 U.S. at 529 (O'Connor, J., concurring op.) (citations omitted); *see id.* at 508-11 (Stevens, J., plurality op.); *Greater New Orleans*, 527 U.S. at 188; *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993).

The First Circuit cited none of these recent articulations of the standard under part four of *Central Hudson*. Instead, it reached back more than a decade to rely solely on *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). 218 F.3d at 50. *Fox* suggested the government's burden is to show only that it acted "reasonab[ly]" in choosing its remedy from among the panoply of regulatory alternatives, and appeared to emphasize the ease with which the government may satisfy the test. *Fox*, 492 U.S. at 480.[10] Subsequent decisions have made clear, however, that the question is not whether the speech ban was reasonably chosen from among a number of options. Rather, the question is whether a speech regulation can be justified as the regulatory tool of choice in light of available alternatives that could have addressed the substantial government interest without impinging on speech. This Court has indicated it will not uphold commercial speech regulations when there "are practical and nonspeech related forms of regulation . . . that could more directly and effectively alleviate" the asserted harm. *Greater New Orleans*, 527 U.S. at 192 (instead of banning casino advertisements, government could have prohibited gaming on credit, limited bets, or imposed other, non-speech restrictions).[11]

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[10] *Fox* cites only *Posadas* for this proposition – a citation the First Circuit omits, without saying so, when it quotes *Fox*. 218 F.3d at 50 (quoting *Fox*, 492 U.S. at 480).

[11] *Greater New Orleans* "erases lingering concern that [*Fox*] had seriously weakened the final element" of *Central Hudson*,

The First Circuit failed to hold the Attorney General to his burden of showing the restrictions were narrowly tailored. First, it is evident that Massachusetts engaged in no "careful calculation" when it enacted the ban on outdoor tobacco advertising within 1000 feet of a school or playground – a zone that accounts for nearly all of the land area in the state's largest cities. To the contrary, the state chose that zone simply because the same restriction was imposed by the Food and Drug Administration under regulations it adopted in 1996.[12] The FDA regulations, and whether they were narrowly tailored, were not considered by the courts below. The First Circuit justified its refusal to scrutinize further the regulatory "fit" on the ground that the tobacco industry has agreed voluntarily not to advertise within 500 feet of schools, and that it would be "splitting hairs" and "judicial second-guessing" to analyze whether a smaller buffer zone would have been equally effective to further the state's interest. 218 F.3d at 50. By refusing to consider whether a restriction half as burdensome on speech as the one enacted would have been adequate to serve the governmental interest, the court effectively relieved the Attorney General of his burden under part four of *Central Hudson*.

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making plain that "the narrow tailoring contemplated by part four of the test does not give the government an anything-goes license to regulate. The hurdle created by the *Central Hudson* test's final element remains a tall one for the government to clear." Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 Am. Bus. L.J. 587, 644 (Summer 2000).

[12] This Court recently struck down these 1996 regulations because the FDA lacked authority to enact them. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The absence of any "careful calculation" by Massachusetts is even more apparent with respect to the indoor advertising restrictions. The First Circuit demanded virtually no evidence of a fit between means and end. First, the FDA regulations on which Massachusetts based its statute did not contain this indoor advertising restriction. 218 F.3d at 51. Also, the Court noted "misgivings" regarding the effectiveness of the rule that point-of-sale signs within the 1000-foot zone had to be placed at least five feet off the ground, but upheld this speech restriction anyway because it was "hardly unreasonable for the Attorney General to determine that stores within 1000 feet of schools and playgrounds . . . will also be more likely to receive minors as customers." *Id.* The court fails to explain, because it cannot explain, how the Attorney General's belief demonstrates "narrow tailoring."

Next, the First Circuit eschewed any consideration of alternative means by which Massachusetts could have reached its stated goals of curbing youth smoking. The court concluded that, "in light of *Fox*," it need not examine the potential effectiveness of alternatives such as criminalizing underage tobacco use or enhancing enforcement of existing laws. *Id.* at 51. The First Circuit simply ignored this Court's more recent commercial speech cases, which hold that the availability of "practical and nonspeech related forms of regulation" to achieve the same governmental interest is evidence that the fit between a speech restriction and the asserted goal is too imprecise to survive under the First Amendment. *Greater New Orleans*, 527 U.S. at 192; *see also 44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring op.); *Rubin*, 514 U.S. at 491. Here, Massachusetts has other methods at its disposal that would effectively serve its interest in reducing illegal underage tobacco use. Most obviously, the

State can sponsor its own speech, educating young people about the dangers of tobacco use and warning tobacco sellers of the consequences they face for selling to minors. It could enact stiffer penalties for illegal sales. It could hire more personnel to enforce existing laws, in stores and in schools. Such alternatives would more directly address the problem of tobacco use by minors without depriving petitioners of their rights under the First Amendment.

Nor does the fact that "alternative modes of communication [are] left open to tobacco manufacturers and retailers" satisfy the Attorney General's obligation to show the regulations are narrowly tailored. 218 F.3d at 51-52. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). Specifically, the Massachusetts regulations cannot be upheld as a mere limitation on the "mode" or manner of communications, because they are not content-neutral. A restriction on the place or manner of speech is impermissible if it is "based upon either the content or subject matter of speech." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). Here, the regulations are not content-neutral; only advertising for tobacco products, and no other sort of advertising, is barred from the 1000-foot zone. Indeed, restrictions on commercial speech are, by definition, based on content; thus, they cannot be upheld as mere time, place or manner limitations. *See Discovery Network*, 507 U.S. at 429-30 (commercial speech restriction content-based and must be narrowly tailored, "regardless of whether or not it leaves open ample alternative channels of communication. . . . "); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (rejecting

argument that ban on residential "for sale" signs was constitutional because "it restricts only one method of communication").

Finally, the First Circuit erred in finding the advertising restrictions are sufficiently narrow, despite their extensive reach, because they "are focused on areas where children are most likely to be present." 218 F.3d at 53. According to the First Circuit, "the principal function of advertising is to propose a commercial transaction, in this case the sale from tobacco products – which, where minors are concerned, is already illegal in Massachusetts." *Id.* at 51. If the advertising in question were in fact proposing that minors purchase tobacco, this point might be well taken. But a limitation on advertising a lawful product cannot be justified on the ground that it is illegal for minors to use it, or by defining a message to the general public as "advertising to children." To the contrary, this Court has rejected such a "lowest common denominator" approach to speech protection. *See, e.g., Bolger*, 463 U.S. at 73 ("the government may not 'reduce the adult population . . . to reading only what is fit for children' ") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Nor may the government avoid strict application of First Amendment principles to protect the interests of persons who are allegedly more susceptible to misuse of the advertised product or service. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1998) (holding that government may not bar adults from receiving "indecent" but constitutionally protected speech in an asserted effort to protect children).

The First Circuit recognized the case law holding it unconstitutional to "deny communications to a large number of adults for the sake of protecting children." 218

F.3d at 52. The court concluded, however, that this principle applies only to "expressive speech, rather than commercial speech. . . . " *Id.* The First Circuit's reasoning, which would justify near-total bans on advertising for any product lawful for adults but not children, is foreclosed by this Court's decisions invalidating just such restrictions. *E.g., Greater New Orleans,* 527 U.S. 173; (casino gambling advertising); *Bolger,* 463 U.S. 60 (mailed advertisements for contraceptives). The Court should once again reaffirm that government or judicial solicitude for children cannot substitute for proof that commercial speech restrictions are narrowly tailored, and no more extensive than necessary, to address a proven harm.

In sum, the First Circuit misapplied *Central Hudson*'s narrow tailoring requirement. It refused to examine the effectiveness of the particular speech restrictions chosen by Massachusetts. It failed to consider possible non-speech alternatives. It relied on an overly broad view of how much speech the government may ban in the name of "protecting the children." Finally, the state admittedly did not carefully calculate the effectiveness of the regulations; it simply adopted the prohibitions contained in the former FDA rules. Such a regulatory scheme cannot survive constitutional scrutiny under a proper application of *Central Hudson.*

CONCLUSION

While the Attorney General's goal in reducing tobacco consumption by minors is laudable, his chosen means cannot be justified. The First Circuit upheld the regulations without holding the Attorney General to his

burden of proving that the regulations directly, and materially, further the stated goal. Moreover, the state failed to demonstrate that the regulations are narrowly tailored in light of the alternatives. The decisions of the courts below cannot be affirmed without doing violence to this Court's commercial speech jurisprudence, which counsels that advertising restrictions must be justified with proof, and can only be used, if at all, as the regulatory tool of last resort. *Amici* respectfully urge the Court to reverse the First Circuit's judgment, and once again to unequivocally instruct the lower courts on the stringent First Amendment standard that must be applied to commercial speech restrictions.

Respectfully submitted,

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APPENDIX

IDENTITY OF INDIVIDUAL AMICI CURIAE

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. *American Civil Liberties Union of Massachusetts* is one of the ACLU's statewide affiliates. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae,* in cases challenging governmental actions that threaten First Amendment rights. The ACLU and its members have a vital interest in the outcome of this case because it raises fundamental questions about whether, and to what extent, the First Amendment permits government to suppress truthful and non-misleading information about lawful products and services.

Dow Jones & Company, Inc. is the publisher of, *inter alia,* The Wall Street Journal, a national newspaper published each business day; WSJ.com, a news site on the world wide web with over 500,000 paying subscribers; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; Barron's, a weekly newspaper of business and finance; and, through its Ottaway Newspaper, Inc. subsidiary, 19 daily and 17 weekly newspapers.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands

and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment right to engage in truthful commercial speech about lawful products and services.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 1,700 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately 87 percent of the U.S. daily newspaper circulation. One of NAA's key strategic priorities is to advance newspapers' interests in First Amendment issues, including the ability to publish information about lawful products and services.

The Reporters Committee for Freedom of the Press ("Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

FEB 22 2001

Nos. 00-596 and 00-597

IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor to Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ADVERTISING FEDERATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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This brief is respectfully submitted pursuant to Rule 37 urging the Court to reverse the decision below of the United States Court of Appeals for the First Circuit on the grounds that Massachusetts' limitations on the public display of tobacco advertising violate the Petitioners' rights under the First Amendment to the Constitution of the United States.[1]

INTEREST OF AMICUS CURIAE

The *amici* herein represent thousands of advertising agencies, advertisers, and others who participate in the advertising industry, as well as business organizations and individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that *amici* present their views to the Court. The *amici* are:

The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are producers and advertisers of consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include: twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

The Chamber of Commerce of the United States of America ("Chamber"), the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members of every size, in every business sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases

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[1] Counsel for both Petitioner and Respondents have consented to the participation of the *amici* in this case, as evidenced by letters filed with the Court pursuant to Supreme Court Rule 37. No party wrote or financially contributed to the preparation of this brief.

involving issues of national concern to American business. This brief is filed because full First Amendment protection to truthful commercial messages about lawful products and services is a matter of profound importance to the Chamber's members.

SUMMARY OF ARGUMENT

The text and history of the First Amendment, as well as the "long accepted practices of the American people," support the view that truthful commercial messages about lawful products and services should be accorded the same constitutional protection as is noncommercial speech. The text, of course, does not distinguish between commercial and noncommercial aspects of the press. The lack of a distinction for constitutional purposes is confirmed by the practice of state legislatures at the time the Bill of Rights was ratified. Although states regulated trade, the only restrictions on advertising concerned the promotion of unlawful activities. This absence of state regulation is consistent with the colonial conception of a "free press," which included advertising, and with the Framer's political philosophy, which equated liberty and property. Full protection of commercial speech is also consistent with the history of the First Amendment, which was adopted in part to bar Stamp Acts that imposed taxes directly on advertising.

Advertising grew essentially unchecked and unregulated throughout the nineteenth century. While the number of states and statutes increased, advertising was barred only where it publicized unlawful products, services, or activities. In addition, towards the end of the century, some restrictions limiting false and misleading advertising were adopted. This Court's treatment of truthful advertising during and immediately after Reconstruction did not distinguish between the treatment accorded other forms of speech.

The Progressive Era witnessed both an increase in the power of advertising and attempts to limit it. But even these attempts overwhelmingly focused on ensuring that advertising was truthful and not misleading. During this time, courts analyzed constraints on commercial speech under the rubric of substantive due process. This confusion of categories caused the Supreme Court

in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to erroneously treat restrictions on advertising as economic regulations subject only to rational basis scrutiny.

That error, which is in part perpetuated by this Court's continued distinction between commercial and noncommercial speech, conflicts with the "long accepted practices of the American people." Those practices—particularly state legislative practice at the times the First and Fourteenth Amendments were ratified—support the contention that truthful commercial messages about lawful products and services are entitled to full First Amendment protection. Under that standard, the advertising restrictions at issue here are plainly unconstitutional.

ARGUMENT

This case involves a challenge to Massachusetts' restrictions prohibiting virtually all outdoor advertising of tobacco products (including indoor advertising visible from the street) within a broadly defined distance of any "park," "playground," or "school," as well as certain point-of-sale advertising regardless of its outdoor visibility. These rules apply even if the ads are truthful, even though they concern a lawful product, and even if most of the people who are exposed to a particular advertisement are adults. Massachusetts argues that these regulations are constitutional because of the need to protect children from positive images of tobacco products. The State's argument stems from the perception that commercial speech occupies some "subordinate position in the scale of First Amendment values." *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). This "subordinate position" is exemplified by this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Amici* demonstrate herein that, throughout most of this nation's history, the American people made no distinction between commercial and noncommercial speech.

Amicus AAF previously addressed the importance of advertising to the historical development of the American press and the concept of free speech. *See, e.g.*, Brief of *Amici Curiae* American Advertising Federation, *et al.*, *44 Liquormart, Inc. v.*

Rhode Island, 517 U.S. 484 (1996) (filed July 6, 1995). Because those points were not fully addressed in the *44 Liquormart* opinion, *amici* bring them again to the Court's attention. In *44 Liquormart*, the Court acknowledged the importance of historical context in unanimously striking down a state prohibition on advertising of liquor prices. *See id.* at 495 (plurality opinion of Stevens, Kennedy, Souter & Ginsburg, J.J.). Justice Thomas, relying in part on the historical analysis of *amici*, rejected the notion that there was any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 522 (Thomas, J., concurring in part and concurring in the judgment) (citing Brief of *Amici*, American Advertising Federation, *et al.*).

Justice Scalia, concurring in the judgment, noted his "discomfort with the Central Hudson test," and his "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 517 (Scalia, J., concurring in the judgment). Justice Scalia found the historical material submitted by AAF, *et al.*, "consistent with First Amendment protection for commercial speech, but certainly not dispositive." *Id.* He stated that "the long accepted practices of the American people" were central to interpreting the First Amendment, including (1) state legislative practices at the time the First Amendment was adopted; (2) state legislative practices at the time of adoption of the Fourteenth Amendment; and (3) "any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field." *Id.* at 517-18.

In this brief, *amici curiae* review the relevant history in an effort to address these issues. The *amici* respectfully submit that the state legislative history and practice, like the available evidence surrounding the understanding of the generation of the Framers, support the proposition that, until relatively recently, the American people did not recognize a distinction in the protections afforded "commercial" and "noncommercial" speech, other than

the advertising of illegal activities and the protections afforded against fraudulent or misleading claims.[2]

I. FULL PROTECTION OF COMMERCIAL SPEECH IS CONSISTENT WITH THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT AND THE PREVALENCE AND IMPORTANCE OF ADVERTISING AT THE TIME OF THE FRAMING.

The development of a free press and of a commercial, advertising-driven press are inextricably linked. *See* Verner W. Crane, *Introduction to Benjamin Franklin's Letters to the Press, 1758-1775,* at xi, xvi (Verner W. Crane ed., 1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would not have occurred to colonial Americans.

A. Advertising Was an Integral Part of the "Press" in Colonial America.

The interrelationship between editorial and advertising content in the eighteenth century press illustrates the fallacy of differentiating for constitutional purposes between commercial and noncommercial speech. American newspapers began to emerge only as colonial business and industry began to grow. *See* Edwin Emery & Michael Emery, *The Press and America* 18 (1978). As small industries developed a need to inform the public of their wares, printers began publishing newspapers to spread that information. As one commentator observed, "[w]ell before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." James Playstead Wood,

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[2] For a more comprehensive discussion of the historical origins of the First Amendment and its application to commercial speech, *see* Daniel E. Troy, *Advertising: Not Low Value Speech*, 16 Yale J. Reg. 85 (1999). The California Supreme Court recently relied on the historical evidence presented here and in that article to find commercial speech entitled to full protection under the California Constitution. *See Gerawan Farming, Inc. v. Lyons*, 101 Cal. Rptr. 2d 470 (2000).

The Story of Advertising 85 (1958). Advertising was a major impetus and means for establishing regularly published newspapers in colonial America.

The majority of advertisements appearing in colonial newspapers would be considered "commercial speech" today. "The colonial press regularly carried reputable medical advertisements, as well as those for books, cloth, empty bottles, corks, and other useful goods and services." Kent R. Middleton, *Commercial Speech in the Eighteenth Century, in Newsletters to Newspapers: Eighteenth-Century Journalism* 277, 282 (Dononvan H. Bond & W. Reynolds McLeod eds., 1977). Without these advertisements, the colonial press so important to the Revolutionary cause would have been less vibrant, if it existed at all because, like today, "[a]dvertising represented the chief profit margin in the newspaper business." Frank Luther Mott, *American Journalism—A History of Newspapers in the United States Through 250 Years: 1690-1960* 56 (3d ed. 1963).

Among the goals of the first attempted colonial newspaper was the promotion of "Businesses and Negotiations." *Publick Occurrences, Both Foreign and Domestick*, Sept. 25, 1690, at 1, *quoted in* Frank Presbrey, *The History and Development of Advertising* 119 (1929). The inaugural issue of the first successful American newspaper contained the following solicitation:

> This News-Letter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c to be Sold or Let; or Servants Run-Away, or Goods Stole or Lost; may have the same inserted at a Reasonable Rate.

Boston Newsletter, Apr. 24, 1704, *quoted in* Wood, *supra*, at 45. The next week's issue of the *Boston Newsletter* contained paid entries that sought the return of two lost anvils, offered a bounty for capturing a thief, and listed a "very good Fulling Mill to be Let or Sold" in Oyster Bay, New York. *Id.* at 45-46.

When the *New Hampshire Gazette* was launched in 1756, its publisher said that the paper would:

> contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect.

New Hampshire Gazette, Oct. 7, 1756 *quoted in* Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 49 (1988). True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy. *See* Lawerence C. Wroth, *The Colonial Printer* 234 (1938). Often, more than half of the standard colonial newspaper was taken up by advertising. In 1766, 70% of Hugh Gaine's *New-York Mercury* consisted of advertising. *See* A. Lee, *The Daily Newspaper in America* 32 (1937).

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements. *See* Presbrey, *supra*, at 161. The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The Boston, New York, and Philadelphia newspapers, like most dailies in these years, "used page one for advertising, sometimes saving only one column of it for reading matter." Mott, *supra*, at 157.

Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal

interest to readers and treated the same. *See* Middleton, *supra*, at 281. As one advertising historian observed:

> Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.

Presbrey, *supra*, at 154. Advertisements were also thought to have independent value in educating and informing the reading public. In the words of prominent printer-historian Isaiah Thomas, editor of a pro-Revolutionary newspaper:

> [A]dvertisements are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328 (1958). As a source of information to the population and income to colonial printers, advertising was influential and plentiful during the latter part of the colonial era.

B. The Absence of Advertising Restrictions Is Consistent with the Colonial Conception of a "Free Press" That Included Advertising.

1. The challenges to early Stamp Acts evidence the colonial conception of a "free press" including advertising.

Given the eighteenth-century equation of liberty and property and the prevalence of advertising in colonial America, it is not

surprising that the very idea of a free press evolved in close connection with the development of advertising. Indeed, one of the major catalysts of the American Revolution involved a defense of advertisements.

As this Court has recognized, one of the best-known statements in defense of a free press—Benjamin Franklin's famous *Apology for Printers*—was written in response to an attack on an advertisement printed by Franklin.[3] Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 174 (Albert Henry Smith ed., 1907). To Franklin, even those "opinions" in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of what is now called commercial speech.

In addition, the British Stamp Act of 1765 assessed a tax on each printed copy of a newspaper and added a two shilling tax for each advertisement therein. As one commentator noted, "[B]y any standard [this amount] was excessive, since the publisher himself received only from 3 to 5 [shillings] and still less for repeated insertions." Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764-1776* 68

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[3] In 1731, Benjamin Franklin printed a politically incorrect advertising notice that was distributed as a stand-alone commercial handbill. The paper proposed a commercial transaction by seeking additional freight and passengers for a ship. At the bottom of the advertisement was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 176 (Albert Henry Smith ed., 1907). This handbill outraged the local clergy (the "Black Gowns"). In response to attacks, Franklin published his *Apology* which was at that time, "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, "Printers and the American Revolution," *in The Press and the American Revolution* 20 (B. Bailyn & J.B. Hench eds., 1980).

(1966). This tax galvanized the colonial press against the British government:

> Stamp duties also, imposed on every *commercial* instrument of writing—on *literary productions*, and, *particularly*, on *newspapers*, which of course, will be a great discouragement to trade; an obstruction to *useful knowledge* in *arts, sciences, agriculture, and manufactures*; and a prevention of *political information* throughout the states.

Objections by A Son of Liberty, New York J., Nov. 8, 1787, *reprinted in* 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed., 1981) (emphasis in original). The opposition of newspapers was based largely, if not primarily, on their concern that the tax encroached on the freedom of expression.[4] Thus, the repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

After the Revolution, and only five years after adopting a state constitution explicitly guaranteeing freedom of the press, Massachusetts enacted a similar stamp tax on newspapers and newspaper advertisements. *See* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 264 (1985) (citing Clyde A. Duniway, *The Development of Freedom of Press in Massachusetts* 132-36 (1966)). These taxes were widely denounced as, in printer Isaiah Thomas's words, an "unconstitutional restraint on the Liberty of the Press." Isaiah Thomas, Essex J., Apr. 19,

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[4] In reacting to the Stamp Act, the Town of Worcester directed its representatives in the Massachusetts Assembly to "take special care of the LIBERTY OF THE PRESS." Schlesinger, *supra*, at 70; *see also* Conn. Gazette, *quoted in id.* (enjoining its readers that "[t]he press is the test of truth, the bulwark the public safety, the guardian of freedom, and the people ought not to sacrifice it"); New York Gazette or Wkly Post-Boy, Nov. 7, 1765, *quoted in id.* at 77 (flaunting its motto, "The United Voice of all His Majesty's *free* and *loyal* subjects in America—LIBERTY, PROPERTY, and no STAMPS.") (emphasis in original).

1786, *quoted in* Carol S. Humphrey, *"That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788*, 14 Journalism Hist. 34, 37 (1987). The 1786 repeal of the ad tax was considered a triumph for press freedom. *Id.*; *see also Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (noting that "[t]he framers were likewise familiar with the then recent Massachusetts episode; and . . . that occurrence did much to bring about the adoption of the [First Amendment]").

2. State trade regulations restricting unlawful products and services only show that the colonial conception of a "free press" included advertising.

The practices of state legislatures around the time of the First Amendment's ratification further evidence that the Framers' generation did not distinguish between the constitutional status of commercial and noncommercial speech.[5] Indeed, state statutes in effect at this time did not restrict truthful commercial messages about lawful products or services.[6] Rather, consistent with the

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[5] All powers not delegated to Congress were reserved to the people and the states. *See* U.S. Const. amends. IX, X. The First Amendment explicitly limited Congress's authority over speech and the press. As such, it is unlikely that the federal government was granted greater power to restrict speech than existed in the states. The fact that, as discussed below, state legislatures did not regulate truthful advertising of lawful products and services suggests that the federal government could not regulate such speech because advertising was regarded as within "the freedom of speech and of the press."

[6] This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. The Public Statute Laws of the State of Connecticut (1808); Laws of Maryland (1811); The Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 23, 1807 (1807); The Laws of the State of New Hampshire (1797); The Laws of the State of New Jersey (1800); Laws of the State of New York (1802); The Public Acts of the General Assembly of North Carolina (1804); Digest of the Acts of the General Assembly of Pennsylvania (1841); The Public Laws of the State of Rhode Island and Providence Plantations (1798); The Public Law of the State of South Carolina (179); Laws of the State of Vermont (1797); Collection of All Such Acts of the General Assembly of Virginia (1803). All compilations

constitutions of the ten states that explicitly protected the freedom of the press,[7] advertising was limited only when used to promote products, services, or activities that were themselves unlawful.

Early statutes show efforts to regulate merchants and shopkeepers,[8] liquor and taverns,[9] potash,[10] malt,[11] a variety of commodities,[12] attorneys,[13] and doctors.[14] Among other things,

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(..continued)
are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

[7] Declaration of Rights para. 23 (Del. 1776); Ga. Const. of 1798 art. IV, § V; Declaration of Rights para. 38 (Md. 1776); Declaration of Rights para. XVI (Mass. 1780); Bill of Rights art. 22 (N.H. 1783); Declaration of Rights para. 25 (N.C. 1776); Declaration of Rights para. 12 (Pa. 1776); Declaration of Rights § 7 (S.C. 1778); Declaration of Rights ch. I, art. XIII (Vt. 1793); Declaration of Rights para. 12 (Va. 1776). Pennsylvania and Vermont connected that provision to protection for freedom of speech. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 441 n.55 (1983). Of the remaining four states in existence when the Bill of Rights was ratified, two—Rhode Island and Connecticut—had not drafted state constitutions; two others—New York and New Jersey—did not provide specific state constitutional guarantees of freedom of press and speech. *See* Leonard W. Levy, *Emergence of a Free Press* 189 (1985).

[8] *See, e.g.*, Act for Punishing and Preventing Oppression, 1635 (amended 1730), The Public Statute Laws of Connecticut 544 (1808).

[9] *See, e.g.*, Act Regulating Licensed Houses, 1791, The Laws of the State of New Hampshire 373-76 (1797); Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, 1801, Laws of the State of New York 439-43 (1802); Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, The Public Acts of the General Assembly of North Carolina 122-23 (1804).

[10] *See, e.g.*, Act to Regulate the Exportation of Potash and Pearl Ash, 1792, The Laws of Maryland 191-92 (1811); Act to Regulate Flax-Feed, Pot-ash and Pearl Ash for Exportation, 1785, The Laws of the State of New Hampshire 377-79 (1797).

[11] *See, e.g.*, Act for the Better Making and Measuring of Malt, 1700, The Laws of the Commonwealth of Massachusetts 186 (1807).

[12] *See, e.g.*, Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, 1785, The Laws of the Commonwealth of Massachusetts 320-23 (1807); Act to

these statutes required licenses, prevented charging of unreasonable prices, and set standards for inspection and weighing of commodities. The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, tempered by the doctrine of *caveat emptor*. *See, e.g.*, *Borrekins v. Bevan*, 3 Rawle 23, 27 (Pa. 1831) ("[A] sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they described."); *see also infra* Section I.B.3; *see generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931).

The sole limitations placed on advertising restricted the promotion of certain prohibited activities. For example, during the period surrounding the ratification of the Bill of Rights, several states prohibited or restricted lotteries as well as their advertisement and promotion.[15] Massachusetts, for example,

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(..continued)
Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Fire-wood, and to Regulate the Weighing of the Merchandise in this Province, 1746, The Public Law of the State of South Carolina 208-10 (1790).

[13] *See, e.g.*, Act Regulating the Admission of Attornies, 1785, The Laws of the Commonwealth of Massachusetts 318-19 (1785).

[14] *See, e.g.*, Act to Regulate the Practice of Physic and Surgery, 1783, Laws of the State of New Jersey 7-8 (1783).

[15] *See, e.g.*, Act for the Prevention of Lotteries, 1792, The Laws of Maryland 189-90 (1811) (prohibiting lotteries as well as their 'propos[al] to the public," absent permission of the legislature); Act for the Suppressing of Lotteries, 1791, The Laws of the State of New Hampshire 339 (1805) (separate penalties for setting up a lottery and "aiding or assisting . . . by printing, or any other ways publishing an account thereof"); Act of Feb. 13, 1797, § 1, The Laws of the State of New Jersey 227-28 (1800) (fining those who print, write or publish any account of where tickets are available, or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery"); Act to Prevent Private Lotteries, to remit certain Penalties, and to Repeal the Acts therein Mentioned, 1783, Laws of the State of New York 35-38

enacted a statute in 1785 declaring that, with respect to unauthorized—and therefore illegal—lotteries, the act imposed penalties separate fines for setting up lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had." Act for the Suppression of Lotteries, 1785, The Laws of the Commonwealth of Massachusetts 252-53 (1807), *amended by* Act of Feb. 28, 1801, *id.* at 8-9 (specifying a fine to be levied upon anyone who "shall aid and assist in any lottery established, or erected in any other of the United States, by advertising any Tickets of such lottery for sale, or by publishing the scheme for any such lottery").

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited staging and advertising horse races. *See* Act to Prevent Horse Racing, 1803, The Public Statute Laws of the State of Connecticut 381-82 (1808); Act Against Horse Racing, 1820, A Digest of the Acts of the General Assembly of Pennsylvania 450-51 (1841). And Rhode Island prohibited the erection of a sign "for the keeping of a public house" without first obtaining an innkeeper's license. Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1728, The Public Laws of the State of Rhode Island and Providence Plantations 391-94 (1798). Despite these regulations, however, the state legislatures were not opposed to advertising in general.

(..continued)

(1802) (providing penalties for being "in any ways concerned" with lotteries not authorized by the state, including "printing, writing, or any other ways publishing an account thereof"); Act for Suppressing and Preventing of Private Lotteries, 1762, The Public Law of the State of South Carolina 256-67 (1790) (fining anyone "who shall make, write, print or publish, or cause to be written or published, any scheme or proposal" for a private lottery). Only Pennsylvania completely outlawed lotteries (and their advertisement). *See* Act for the More Effectual Suppressing and Preventing of Lotteries, 1762, A Digest of the Acts of the General Assembly of Pennsylvania 584-85 (1841) (setting 20 pound fine for, *inter alia*, advertising or causing to be advertised any lottery).

3. Common law exceptions to free commercial speech involving false or misleading speech show that the colonial conception of a "free press" included advertising.

The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation (as well as the torts of libel and slander). Sir William Blackstone acknowledged that "every kind of fraud is equally cognizable in a court of law." 3 *William Blackstone Commentaries* *431 (1769). Justice Joseph Story's treatise *Equity Jurisprudence* addressed that "old head of equity," the law of misrepresentation, in detail:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage of him; in every sense there is a positive fraud in the truest sense of the terms.

Joseph Story, *Equity Jurisprudence* § 192 (1836). That liability could accompany this category of speech demonstrates that it was beyond what was understood to be constitutionally protected. A proposed draft of the First Amendment by Thomas Jefferson shows that the free press envisioned by the Framers did not encompass the publication of falsehoods—commercial or noncommercial: "The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations." 15 *The Papers of Thomas Jefferson* 367, 367 (J. Boyd ed., 1958).

Advertisements of unlawful products were also outside the scope of constitutional protection. According to Blackstone, the common law considered it a criminal offense to "procure, counsel, or command another to commit a crime." 4 *William Blackstone Commentaries* *36 (1769) (defining an accessory before the fact); *The King v. Higgins*, 102 Eng. Rep. 269, 276

(K.B. 1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases."); *see generally Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Advertising unlawful products could thus be prohibited at common law as solicitation to commit a crime.

4. Fully protecting advertising is consistent with the Framers' political philosophy, which equated liberty and property.

The inextricable link between commercial and other speech is also reflected in the Framers' political philosophy, which generally equated liberty and property rights. In seventeenth and eighteenth century England there were two reigning justifications for free expression: the idea that free speech "was an instrument to some collective good" and the notion that free speech was a "natural property right of the individual." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 58 (1996).

In this tradition, freedom of speech and property rights were seen as essential parts of an individual's liberty, an understanding derived from the writings of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." John Locke, *The Second Treatise on Government* 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtg. 1975) (1690).[16] As one newspaper commentator put it, "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without

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[16] George Mason's Virginia Declaration of Rights evidences this Lockean linkage of liberty and property, stating that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety." Declaration of Rights para. 1 (Va. 1776).

the enjoyment of the other." Boston Newsletter, Feb. 16, 1772, *quoted in* Clinton Rossiter, *Seedtime of the Republic* 379 (1953).

The libertarian Cato drew on Locke in equating liberty and property.[17] Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights:

> This sacred Privilege is so essential to free government, that the security of property, and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own.

John Trenchard & Thomas Gordon, 1 *Cato's Letters* 110 (Ronald Hamow ed., Liberty Classics ed. 1995) (1720-23) (Essay No. 15, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, Feb 4, 1720).

Distinguishing between the value of commercial and noncommercial speech thus would never have occurred to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. James Madison, the drafter of the First Amendment, echoed Locke and Cato, writing:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

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[17] *Cato's Letters* were published from 1720 to 1723 and widely circulated in the colonies as "the most popular, quotable, esteemed source of political ideas in the colonial period." Rossiter, *supra*, at 141. His articulation of the tie between property rights and free speech was enormously influential in colonial America. *See* Smith, *supra*, at 25. In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. *See generally* Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* 3 (Leonard W. Levy ed., 1996)).

> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, a man has a property *in his opinions and the free communication of them.*

James Madison, *Property*, The National Gazette, Mar. 27, 1792, *reprinted in* James Madison, 14 *Papers of James Madison* 266-68 (Robert A. Rutland & Thomas Mason eds., 1983) (1792) (emphasis in original).

This linkage of liberty and property rights strongly suggests that colonial Americans viewed the First Amendment as protecting far more than political speech. As one contributor writing under the pseudonym 'Philalethes" declared in Boston's *Herald of Freedom* in 1788, that Americans:

> are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on every subject[. This] constitutes the dignified character of Americans.

Boston Herald of Freedom, Sep. 15, 1788, *quoted in* Smith, *supra*, at 19. Commercial matters were to be counted among the "subjects" to which the freedom of speech obtained. As leading Anti-Federalist Richard Henry Lee said in his demand for a bill of rights, "A free press is the channel of communication as to mercantile and public affairs." Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962). In keeping with the recognition that the Framers sought to guarantee advertising as a critical part of the press, the text of the First Amendment does not distinguish between commercial and noncommercial aspects of the press.

II. THE PERVASIVENESS OF ADVERTISING AND STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT ARE CONSISTENT WITH THE VIEW THAT COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

An examination of state legislative practices at and around the time the Fourteenth Amendment was ratified confirms that truthful messages about lawful products or services are entitled to full protection. This period marked a robust increase in the prominence and utility of advertising. States, while adopting some restrictions on advertising that reflected the general shift from the common law tradition to statutory law, *see, e.g.*, Morton Keller, *Affairs of State* 347 (1977), continued to focus their regulatory efforts on limiting advertising for illegal products and services.[18]

A. Commercial Speech Was an Integral Part of American Life During Reconstruction.

Advertising was "vigorous and thriving by the mid-nineteenth-century mark." Wood, *supra*, at 158. As one publisher in 1847 observed, "advertising is news. People wanted to read it just as much as they wanted to read the reports of the day's happenings." *Id.* at 159-60. To illustrate, a typical issue of the *New York Herald* in 1860 carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter, only advertising. *See id.* at 166-167; Mott, *supra*, at 397-98, 593-94. Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers. *See* Mott, *supra*, at 397; Presbrey, *supra*, at 259. Nonetheless, even in 1869, the *New York Herald* typically

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[18] This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law at the time of incorporation. The Territorial Codes of Utah, Washington, Wyoming, and New Mexico were also examined. The State Code of Wisconsin could not be found, but the codes of the other thirty-seven states admitted to the union by 1880 were examined.

held eight columns of news, and fifty columns of advertising. *See* Wood, *supra*, at 169.

Although the Civil War may have pushed advertising from the front page, advertising's demonstrated ability to sell Union war bonds led to a vast expansion in its use. *See* Presbrey, *supra*, at 253. A year after the Civil War ended:

> Every rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.

Wood, *supra*, at 182; *see* Presbrey, *supra*, at 255.

Advertising's prominence also led to other innovations including the first advertising agent in 1841, the first newspaper directory in 1869 and the first market survey in 1879. *See* G. Allen Foster, *Advertising: Ancient Market Place to Television* 48-49, 126-31 (1967); Wood, *supra*, at 142. In 1867, *Galaxy Magazine* described advertising in the United States as having arrived at the point at which:

> the names of successful advertisers have become household words where great poets, politicians, philosophers and warriors of the land are as yet unheard of; there is instant recognition of Higg's saleratus and Wigg's soap even where the title of Tennyson's last work is thought to be 'In the Garden,' and Longfellow understood as the nickname of a tall man.

Presbrey, *supra*, at 255. Advertising had become a major part of American culture.

B. State Legislative Practice During Reconstruction Is Consistent with Full First Amendment Protection for Truthful Commercial Speech Promoting Lawful Products and Services.

As advertising emerged as an increasingly powerful societal force, state governments allowed it to grow unchecked, primarily restricting the promotion of illegal products or services only.[19] The few existing advertising restrictions were aimed at the illegality of the advertised conduct, rather than advertising itself. For example, Delaware prohibited advertising by unlicensed lottery retailers. Del. Rev. Stat. ch. 98, v. 12, § 6 (1874). Similarly, Vermont barred the advertising of lotteries "not authorized by the law of this state or of the United States." Vt. Stat. tit. 34, ch. 119, § 7 (1870).

In response to an aggressive anti-abortion campaign beginning in the 1840s, many states adopted extensive abortion restrictions. *See* James C. Mohr, *Abortion in America* 147-170 (1978). Some laws penalized "[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage]." Conn. Gen. Stat. tit. 12, ch. 2, § 25 (1866).[20]

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[19] For example, as before, a number of states restricted lottery advertising. *See, e.g.*, Cal. Penal Code § 323 (1872); Conn. Gen. Stat. tit. 12, § 150 (1866); Del. Rev. Stat. chap. 98, v. 12, § 6 (1874); Digest of Laws of Fla. ch. 80, § 4 (1881); Iowa Code § 4043 (1873); Compiled Laws of Kan. ch. 31, § 342 (1885); Ky. Rev. Stat. ch. 28, art. 21, § 4 (1860 & Supp.); Me. Rev. Stat. tit. 11, ch. 128, § 13 (1884); Md. Code art. 30, § 114 (1860); Miss. Rev. Code § 2605 (1871); Compiled Laws of Nev. § 2498 (1873); N.Y. Rev. Stat. ch. 20, tit. 8, § 53 (1875); Or. Gen. Laws, Crim. Code, ch. 8, § 661 (1874); Compiled Laws of the Territory of Utah § 2002 (1876); Vt. Gen. Stat. ch. 119, § 7 (1870).

[20] *See also* Cal. Penal Code § 317 (1872); Digest of Laws of Fla. ch. 59, § 10 (1881); Compiled Laws of Kan. ch. 31, § 342 (1885); Md. Laws ch. 179, § 2 (1868); Mass. Gen. Stat. ch. 165, § 10 (1860); N.J. Rev. Stat., Crimes § 44 (1874); N.Y. Rev. Stat. pt. 4, ch. 1, tit. 6, § 78 (1875); Ohio Rev. Stat. ch. 2732, § 1 (1860 & Supp.); R.I. Gen. Stat. ch. 232, § 23 (1872); Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876). Notably, these restrictions applied with equal force to all speech regarding abortion, commercial or noncommercial.

Other then-illegal products or activities that could not be advertised included prize fights,[21] and obscene books.[22] Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising. *See* W. Va. Code ch. 149, § 11 (1868); N.Y. Rev. Stat. pt. 4, ch. I, tit. 6, § 77 (1875); Compiled Laws of Kan. ch. 31, § 342 (1885).

Despite the absence of legislation barring false and misleading advertising of lawful products and services, as advertising increased, so too did the recognition that, if false, it could cause harm. Beginning around 1864, certain more successful newspapers refused to accept ads for questionable medicines and quacks. *See* Wood, *supra*, at 180. Many papers warned their readers against disreputable advertisers. In 1872, the national government enacted regulations to restrict the dissemination of fraudulent ads through the mail.[23]

To the extent that this Court addressed issues relating to advertising during and immediately after Reconstruction, its decisions were consistent with the view that advertising should be accorded the same protection as other forms of speech. To illustrate, in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court held that Congress's 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion primarily dealt with Congress's power over the postal system, stating that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." *Id.* at 732. But this Court treated lottery advertisements in the same way that it treated material that today would be fully protected.

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[21] Compiled Laws of Kan. ch. 31, § 338 (1885).

[22] Cal. Penal Code § 311(4) (1872); Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876).

[23] *See* Act of June 8, 1872, ch. 335, 17 Stat. 283 (codified at 39 U.S.C. § 3005 (1994)) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined to have fraudulently obtained money or property via mail).

III. LESSER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DISENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS.

A. The Pervasiveness of Advertising Grew in the Early Twentieth Century.

Advertising experienced unprecedented growth and prestige in the early twentieth century.[24] By 1898, a survey by the *Press and Printer* of Boston counted 2,583 companies that advertised in regular periodicals of general circulation. *See* Presbrey, *supra*, at 362. Advertisements during World War I helped to sell $24 billion in war bonds to 22 million Americans and raise $400 million for the Red Cross. *See id.* at 565. One observer remarked:

> Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success.

Id. at 566.

As was the case after the Civil War, this widespread recognition of the power of advertising in war was not lost on manufacturers and retailers when peace returned. Total investment in advertising soared from $1.5 billion in 1918 to

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[24] The 1904 St. Louis World's Fair recognized the growth of the industry and staged "Ad-Men's Day" with a meeting grandly named "The International Advertising Association." George French, *20th Century Advertising* 119 (1926). Professionalization of advertising continued with the creation of the Advertising Federation of America, which was formed in 1905. *See* Wood, *supra*, at 335. Other advertising groups were formed later, including the New York Advertising League in 1906 and the American National Advertising Managers in 1910. *See* French, *supra*, at 131, 141.

almost $3 billion in 1920 and continued to grow throughout the decade. *See* Wood, *supra*, at 364-365.[25]

B. Disenchantment with Advertising Became Apparent as a Result of Reform Movements and the Great Depression.

As the Gilded Age gave way to the Progressive Era and the notion that civil liberties differed from economic liberties began to take hold, disenchantment with unfettered capitalism, and advertising, grew. *See* Matthew Josephson, *The Robber Barons* 445-53 (1934); *see generally* Richard Hofstadter, *The Age of Reform* (1955). Magazines that had once accepted patent medicine advertisements—such as the *Ladies Home Journal* and *Collier's*—led the charge in 1904 and 1905 against the fraudulent claims made by the industry.[26] *See* Wood, *supra*, at 327-30, 332. Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims. *See id.* at 334. The public outcry against adulterated and dangerous foods and drugs ultimately led to the passage of the Pure Food and Drugs Act of 1906, which forced manufacturers to justify their claims and list product ingredients. *See id.* at 333.

Because of these and other concerns, the advertising industry in 1911 pushed for a model statute barring "untrue, deceptive, or misleading" advertising. Hurnard J. Kenner, *The Fight for Truth in Advertising* 28 (1936). By 1920, thirty-seven states had adopted the Advertising Federation of America's model antifraud statute, *see* Wood, *supra*, at 336, which largely represented a codification of long-standing common-law restrictions on false or

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[25] Part of this growth stemmed from the use of radio as a new advertising medium. Although the first radio ad did not air until 1923, by 1929 the industry received an estimated $15 million in advertising revenues for its roughly 500 broadcast stations. *See* Presbrey, *supra*, at 578.

[26] Other targets of early reformers included billboards and other advertising perceived to be littering the landscape and testimonial advertising by celebrities who did not disclose that a fee had been paid for their endorsement. *See* Wood, *supra*, at 347, 392-93.

misleading commercial messages. *See* William F. Walsh, *A History of Anglo-American Law* 328-329 (1932).

The Depression hit advertising hard in terms of both income[27] and, perhaps more importantly, in public esteem. *See* Wood, *supra*, at 418. Critics charged that advertising was wasteful, merely adding to the consumer's cost. *See id.* at 424. Advertising was attacked because:

> There had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Advertising was to blame, and shrill cries arose for its annihilation.

Id. at 418.[28] This national mood during the Depression spurred calls for increased restrictions on advertising. The federal government aggressively responded to the perceived excesses of advertising through New Deal enactments.[29]

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[27] Following the stock market crash, advertising revenues tumbled from $3.4 billion in 1929 to $1.3 billion in 1933. *See* Wood, *supra*, at 417.

[28] Public skepticism about the role of advertising in the American economy rose significantly. The consumers' movement formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs, Eat, Drink and Be Wary*, and *Partners in Plunder*. *See* Wood , *supra*, at 419-420.

[29] Indeed, Professor Bruce Ackerman has argued that these and other changes brought about by the New Deal amounted to a decisive watershed in constitutional law. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 510-514 (1989); *see also* David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699 (1991) (defining the New Deal as one of three "First Amendment Eras").

C. The Incorrect Association of Advertising and Economic Liberties Led to the Misguided Distinction Between Commercial and Noncommercial Speech.

Although disenchantment among the body politic with economic liberties led to increased state regulation of the economy, this Court initially dampened that sentiment, employing the doctrine of substantive due process to strike down many state laws. Before 1919, the Court treated political speech as subject to the states' police power, power from which economic activities were relatively free. But:

> The Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity . . . . '[F]ree trade in ideas' became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992*, at 100-01 (1996). In contrast to the First Amendment, which this Court had not treated as applicable to constrain state power, the Fourteenth Amendment's due process clause was interpreted to apply to the states.[30]

Thus, most judicial challenges during this period to restrictions on advertising relied on a substantive due process claim that the restrictions interfered with the pursuit of a lawful business rather than advancing First Amendment claims. For example, in *Halter v. Nebraska*, 205 U.S. 34 (1907), this Court upheld a state law barring use of the American Flag on beer bottles. The parties failed even to raise a First Amendment challenge, and instead relied on a due process claim. State courts during this period also analyzed, and in many cases invalidated, challenges to

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[30] It was not until 1931 that this Court first held that the First Amendment applied to the states. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).

advertising regulations under the rubric of substantive due process.[31]

By the time the Court decided *Valentine v. Chrestensen*, 316 U.S. 52 (1942), however, in which it first stated that advertising was outside the protection of the First Amendment, the notion of substantive due process had been rejected, and review of economic legislation reduced to "rational basis" scrutiny.[32] *Valentine*'s dismissive treatment of commercial speech seems most closely linked to the Court's rejection of economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. Thus, what has been said about the Contracts Clause may be said about the protection of commercial speech: "misinterpreted as a form of economic substantive due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded." Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526 (1987).

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[31] *See, e.g., Seattle v. Proctor*, 48 P.2d 238, 239 (Wash. 1935) (striking down a city statute compelling businesses to disclose "the number of such . . . [articles] and the lowest price at which each of said articles were offered for sale to the public prior to said advertisement"); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925) (holding unconstitutional a bar on advertising by dry cleaners without the fire marshal's permission to engage in business); *see also State ex rel. Booth v. Beck Jewelry Enterprises, Inc.*, 41 N.E.2d 622, 626 (Ind. 1942) ("Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment.") (citations omitted).

[32] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis."); *see also* Yassky, *supra*, at 1729-1730 (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's constitutionalization of rights to property and contract). *But see Needham v. Proffitt*, 41 N.E. 606, 608 (Ind. 1942) (striking down statute prohibiting funeral directors from advertising under state free speech guarantee).

Thus, the differentiation between commercial and noncommercial speech is properly understood as an outgrowth of twentieth-century disenchantment with property rights and economic liberties, and the mislabeling of advertising as a substantive due process right rather than a First Amendment freedom. The distinction between commercial and noncommercial speech, however, is inconsistent with the text and history of the First and Fourteenth Amendments, as well as with the long-standing "traditions of the American people."

IV. THIS PROPOSED INTERPRETATION OF THE FIRST AMENDMENT WILL NOT DRAMATICALLY ALTER THE COURT'S FIRST AMENDMENT JURISPRUDENCE.

Removing the distinction between commercial and noncommercial messages is consistent with most commercial speech cases this Court has decided. Indeed, in most cases, the Court has found restrictions on commercial speech to be unconstitutional. *See, e.g., Greater New Orleans Broadcasting Ass'n v. FCC,* 527 U.S. 173 (1999) (holding that the First Amendment protects broadcast advertisements for casino gambling and gambling-related activities when those advertisements are broadcast from states that permit such gaming activities); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down complete statutory ban on price advertising for alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a federal law barring brewers from displaying alcoholic content of their beers on the products' labels); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down a restriction preventing Florida CPAs from making uninvited in-person visits of telephone calls to potential clients); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down a ban prohibiting newsracks used to distribute commercial handbills on public property). This analysis would also have the impact of avoiding the anomalous results that the *Central Hudson* test occasionally allows. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

The proposed interpretation would not, however, prevent government regulation of false and misleading advertising. As shown, the First Amendment has always been understood to allow regulation of such speech. This view is consistent with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where this Court granted First Amendment protection to commercial speech but held that the government had the power to ensure that commercial messages were not false or misleading. *See id.* at 771-72 n.24. Similarly, the government would not be prohibited from restricting advertising of illegal products and services.[33] Thus, affording commercial speech full protection is consistent with the traditional understanding of the First Amendment and is not contrary to the established precedents of this Court.

V. MASSACHUSETTS' RESTRICTIONS ON TRUTHFUL MESSAGES ABOUT A LAWFUL PRODUCT ARE PROHIBITED BY THE FIRST AMENDMENT.

Assessed under the proper level of scrutiny accorded fully protected speech, Massachusetts' restrictions are clearly unconstitutional.[34] The presence of some children in the audience cannot justify these sweeping restrictions. This does not mean that a bar on tobacco ads in *Boy's Life* or *My Weekly Reader* would be unconstitutional. But the government cannot restrict a

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[33] Products and services that could not be advertised in the colonial and Reconstruction eras were prohibited in their entirety (*e.g.*, horse-racing and lotteries). Such activities, when lawful, could be advertised. There is no basis for relying on such statutes to uphold advertising restrictions on products that may lawfully be marketed to the overwhelming majority of the population. *See Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 837 (5th Cir. 1989) (noting that protection of commercial speech "would disappear if its protection ceased whenever the advertised product might be used illegally").

[34] As the Petitioners' brief conclusively demonstrates, however, assessed under the *Central Hudson* analysis, Massachusetts' restrictions are unconstitutional. *See* Petitioners' Brief. Certainly, if the regulations were invalid under this lower level of scrutiny, they would fail under the more searching review required for fully protected speech.

truthful message about a lawful product merely because some of those exposed to the message about that product may not lawfully purchase it. Moreover, Massachusetts' regulations are not sufficiently narrowly tailored to serve the government's interest.

CONCLUSION

For the reasons set forth herein, the Court should reverse the First Circuit's decision. In the process, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as noncommercial speech.

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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; and UNITED STATES TOBACCO COMPANY,

—and—

ALTADIS U.S.A. INC., AS SUCCESSOR TO CONSOLIDATED CIGAR CORPORATION AND HAVATAMPA, INC.; GENERAL CIGAR CO., INC.; JOHN MIDDLETON, INC.; LANE LIMITED, AS SUCCESSOR TO TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; and SWISHER INTERNATIONAL, INC.,

Petitioners,

—v.—

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF INFINITY OUTDOOR, INC. AND VISTA MEDIA GROUP, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of Infinity Outdoor, Inc. ("Infinity") and Vista Media Group, Inc. ("Vista"), two of the nation's leading outdoor advertising companies.[1] Infinity, formerly known as Outdoor Systems, Inc., since its 1999 merger with Infinity Broadcasting Corporation, has been part of the world's largest outdoor advertising company and operates in 90 metropolitan markets in the United States. Vista is a leading outdoor advertising company operating predominantly in New York City and Los Angeles, which, as a minority-run business, specializes in serving the advertising needs of minority communities. Both Infinty and Vista, as primary participants in the outdoor advertising industry, believe in the importance of a strong First Amendment and of strong protections for commercial speech.

As leaders in the outdoor advertising industry, *amici* are interested in and deeply concerned about the potential for any ruling that might permit an effectively complete ban on outdoor advertising for an entire category of legal products. *Amici* are particularly interested in this case because it calls into question the very standard by which commercial speech restrictions should be reviewed by this Court. *Amici* submit this brief to urge this Court to determine that full First Amendment protection should be accorded to truthful, nonmisleading speech—regardless of its status as commercial or noncommercial.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution to its preparation and submission. In addition, the parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk of the Court.

Commercial speech, like political speech, contributes to the "marketplace of ideas," and not solely the market for goods. The flow of information about products—provided that information is truthful, and is not misleading to the public—should be unimpeded, in the interest of enabling citizens to make fully informed choices about both the products they wish to purchase and the broader social issues that frequently surround those products. When government restricts the information available to the people, under the guise of advancing particular social policies, it threatens the very core of this country's regard for the freedom of speech.

Amici urge the Court to abandon the unworkable and outdated test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), in cases where truthful, nonmisleading speech is at issue. In its place, in accord with the increasingly protective trend in the Court's recent commercial speech jurisprudence, the Court should expressly recognize that, except in circumstances when the state seeks to protect consumers from distinctly "commercial harms," there is no justification for treating speech differently simply because of its nature as advertising. Restrictions on such speech should be subject to strict scrutiny, as are restrictions on all other forms of protected speech.

SUMMARY OF ARGUMENT

In the twenty-one years since this Court first sought to set forth standards for determining when commercial speech should be deemed protected under the First Amendment, this Court has been repeatedly put to the painful task of determining how to apply those standards—and whether, in fact, the standards should continue to be used. This is the nineteenth case relating to commercial speech to be heard by the Court since it

issued its 1980 ruling in *Central Hudson*, a devotion of judicial resources that far outstrips that involving any other First Amendment issue—and, quite possibly, any other specific issue relating to the Bill of Rights.

In this brief *amici curiae*, we urge the Court to abandon the commercial speech test set forth in *Central Hudson* as ill-conceived, inconsistent with First Amendment theory and impossible to enforce on a consistent basis. We urge the Court instead to treat truthful, nonmisleading commercial speech the same as noncommercial speech—and to apply strict scrutiny to content-based, paternalistic regulations designed to protect the public from the perceived deleterious effects of such speech. In doing so, we rely heavily on opinions of at least five members of this Court, who have themselves expressed dissatisfaction with *Central Hudson*.

We submit that the rationales for affording commercial speech less protection than other forms of speech have been discredited, and, in any event, are wholly inapplicable to truthful and nonmisleading commercial speech. We also maintain that content-based restrictions on truthful, nonmisleading commercial speech implicate the same powerful First Amendment principles as content-based restrictions on noncommercial speech. Finally, we argue that *Central Hudson* has proven to be an unworkable standard that fails to provide the kind of predictability and consistency that the First Amendment demands. Accordingly, in cases where it is undisputed that the commercial speech at issue is truthful and nonmisleading, *Central Hudson* should be abandoned and strict scrutiny applied.

ARGUMENT

I. THIS COURT SHOULD TREAT TRUTHFUL, NONMISLEADING COMMERCIAL SPEECH THE SAME AS NONCOMMERCIAL SPEECH

A. The Rationales for Affording Commercial Speech Less Protection than Other Forms of Speech Are Constitutionally Insupportable

1. The Rationales for Providing Commercial Speech Generally with Limited First Amendment Protection

Since this Court first held that commercial speech is protected under the First Amendment in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), it has struggled with the question of just how much protection truthful, nonmisleading commercial speech should be afforded. In *Virginia State Board of Pharmacy*, a case striking down a Virginia statute making it illegal to advertise prescription drug prices, the Court made clear that commercial speech was entitled to significant First Amendment protection, subject to certain "common sense differences" between commercial and noncommercial speech that "suggest that a different degree of protection is necessary" between the two. *Id.* at 771 n. 24.

The Court identified two "common sense differences." The first was that the truth of commercial speech was more easily verifiable than that of noncommercial speech. The second was that commercial speech was, by its nature, more "durable" and less likely to be chilled than noncommercial speech by regulation. *See id.* The Court concluded that these differences made differential treatment between commercial and noncommercial

speech necessary in order "to insure that the flow of truthful and legitimate commercial information is unimpaired." *Id.*

From the outset, then, the goal of differential treatment between commercial and noncommercial speech was to facilitate truthful and nonmisleading commercial speech without hampering governmental efforts to limit untruthful or misleading commercial speech. Accordingly, the Court in *Virginia State Board of Pharmacy* both emphasized the "indispensable" nature of the free flow of truthful commercial speech and the fact that, under its holding, various commercial speech regulations designed to protect consumers from coercion or deception would still be permissible—*e.g.*, prohibitions against false or misleading speech; bans on advertising for illegal products; and appropriate warning or disclaimer requirements. *Id.* at 765, 770-72. What was *not* permissible under the First Amendment, the Court emphasized, were paternalistic government regulations aimed at protecting the public from the perceived dangers of their exposure to truthful commercial speech. The Court thus concluded that:

> "[O]n close inspection it is seen that the State's protectiveness of its citizens [*i.e.*, by prohibiting pharmacists from advertising drug prices] rests in large measure on the advantages of their being kept in ignorance. . . . There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communications rather than to close them. . . . [T]he choice among these alternative approaches is not ours to make or the Virginia

> Assembly's. It is precisely the kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Id. at 769-70.

2. *Central Hudson* and the Expansion, Without Any Stated Rationale, of Limited Protection to Truthful and Nonmisleading Commercial Speech

Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court articulated a four-part test that sought to take into account the so-called "common sense differences" between commercial and noncommercial speech cited in *Virginia State Board of Pharmacy*. Commercial speech, the Court held, is protected by the First Amendment, as long as the speech in question (1) concerns lawful activity and is not misleading; if those criteria are met, the government may regulate the speech only if it can show (2) that its asserted interest in regulation is substantial, (3) that the regulation at issue directly advances that interest, and (4) that the restriction is "not more extensive than is necessary. . . ." *Central Hudson*, 447 U.S. at 566.

In a concurring opinion, Justices Blackmun and Brennan took issue with the new test, arguing that although permissible restraints on commercial speech had, until *Central Hudson*, "been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques," *Central Hudson*'s four-prong test opened the door to government imposition of the very paternalistic regulations of truthful commercial speech that *Virginia State Board of Pharmacy* had condemned—"covert attempt[s] by the State to manipulate the choices

of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson*, 447 U.S. at 574-75 (Blackmun, J., concurring in the judgment). In fashioning a test that left open the possibility that such paternalistic regulations might in some instances be deemed proper, the Court held for the first time, not only that commercial speech was entitled to less than full First Amendment protection, but that *truthful, nonmisleading* commercial speech was as well.

In doing so, the Court provided no rationale in *Central Hudson* for extending watered-down First Amendment protection to truthful, nonmisleading commercial speech, relying instead on the "common sense differences" between commercial and noncommercial speech cited in *Virginia State Board of Pharmacy* to justify differential treatment of commercial speech generally. *See Central Hudson*, 447 U.S. at 566. Since the Court decided *Central Hudson*, it has offered little explanation as to why less than full protection for commercial speech should be afforded beyond passing references to those "common sense differences."

Additional rationales—to the extent they exist at all—must be teased out of the case law, and all focus on the State's interest in regulating commercial transactions in order to address consumer protection-type concerns, such as full disclosure and fair dealing. For example, in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court noted that, because commercial speech is linked to the transactions it proposes, "the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to

regulate commercial speech that is 'linked inextricably' to those transactions.") (plurality opinion). Likewise, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court cited the State's "interest in preventing commercial harms" as the "typical reason" why commercial speech can be subjected to greater governmental regulation than noncommercial speech. *Id.* at 426. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (citing "commercial speech's potential to mislead" as the reason for limiting protection of commercial speech generally) (Stevens, J., concurring in the judgment). As these opinions suggest, there is little, if any basis, for limiting First Amendment protection for commercial speech absent the need to prevent the commercial harms associated with false or misleading speech.

Yet to date, this Court has never clarified its rationale for failing to provide truthful, nonmisleading commercial speech with full First Amendment protection (as opposed to commercial speech generally). Given that the rationale for commercial speech's lesser-protected status lies in the government's interest in enforcing consumer protection-type laws, it is not surprising that both members of this Court and legal scholars have increasingly asserted that, in cases where it is undisputed that the commercial speech at issue is true and nonmisleading, there is no legitimate rationale for limiting First Amendment protection. *See, e.g., Rubin*, 514 U.S. at 494 (citing "commercial speech's potential to mislead" as basis for limiting protection of commercial speech) (Stevens, J., concurring in the judgment); *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring in part and concurring in the judgment) ("Nor do I believe that the only explanations that the Court has ever advanced for treating 'commercial' speech differently from other speech can justify restricting 'commercial' speech in order to keep information from legal purchasers so as to

thwart what would otherwise be their choices in the marketplace."); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 634-50 (1990) (questioning basis for general distinction between commercial and noncommercial speech and calling for an abandonment of that distinction). If there is a legitimate rationale for regulating truthful, nonmisleading speech more so than noncommercial speech, it has yet to have been articulated.

3. The Rationales for Limited Protection of Commercial Speech Have Been Discredited as Both Inaccurate and Irrelevant

Any "common sense" rationale for limiting protection for commercial speech generally has been thoroughly discredited as both inaccurate and irrelevant by a leading article on this subject. *See* Kozinski & Banner, 76 Va. L. Rev. at 637-38 ("[T]he Supreme Court's only two proffered justifications for affording commercial speech a lower level of protection, that it is more objective and more durable than noncommercial speech, really provide no support for treating it differently than noncommercial speech."). For example, the Court's first "common sense distinction" between commercial and noncommercial speech generally—namely, that it is easier to ascertain the truth of commercial speech—is simply untrue. Although in some cases, commercial speech makes factual assertions that are readily verifiable—*e.g.*, Supermarket X sells rice for $1/pound—the notion that commercial speech is inherently more "objective" than other forms of speech fails to take into account the realities of modern-day advertising. Consider a billboard ad that merely exclaims, "Coke is it!" The truth of that much trumpeted claim is not objectively verifiable at all. Or consider the television ads aired each year during the Super Bowl. Many of those ads make no factual asser-

tions at all, but rather present thirty-second mini-comedies that differ from fully-protected works of fiction only in length (*e.g.*, Budweiser's popular "Wassup?" ads). These mini-shows are no more "true" or "false" than any other work of fiction. *See id.* at 635-41.

In any event, the objective verifiability of a type of speech seems wholly irrelevant to the question of whether or not it should be entitled to full First Amendment protection. Speech about scientific matters is fully protected even though it is probably the paradigmatic type of verifiable speech. Any suggestion that the verifiability of scientific speech should make it subject to lesser First Amendment protections is wholly insupportable. *Id.* at 634.

The Court's second "common sense" rationale for giving commercial speech limited protection—that commercial speech is more durable than other types of speech because it is engaged in for profit—is equally problematic. For starters, it too is not necessarily true. As Kozinski and Banner point out, non-financial interests, such as religious convictions and artistic passions, can be just as strong, if not stronger, than financial ones. *Id.* at 637. Moreover, this Court has repeatedly held that the fact that protected speech is engaged in for profit does not strip it of its fully protected status. *See, e.g., Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952) ("That books, newspapers and magazines . . . are sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.").

In any event, even if commercial speech were more durable than other forms of speech, that would still not be a valid reason for stripping it of full First Amendment protection. The fact that a type of speech can thrive even after considerable regulation does not mean that it

should—or constitutionally may—be so regulated. In the end, the durability rationale—like that relating to verifiability—fails to provide justification for the lesser protection afforded commercial speech generally.

Even if the rationales provided by the Court for distinguishing between commercial and noncommercial speech generally were valid, neither provides any basis for permitting government to regulate truthful, nonmisleading commercial speech more strictly than noncommercial speech. This is especially so in circumstances where the purpose of the regulation is to keep the public unenlightened and to manipulate people's choices in the commercial marketplace for their own supposed benefit. *See 44 Liquormart*, 517 U.S. at 523 n.4 (Thomas, J., concurring in part and concurring in the judgment). Nor is there any legitimate justification for this kind of paternalism, which is so directly at odds with the interests of the First Amendment.

As the stated rationales for limited protection have been discredited, and in any event, clearly do not apply to truthful, nonmisleading commercial speech concerning legal products, the Court should apply strict scrutiny to regulations, like the one at issue in this case, that deal only with such speech and that do not implicate consumer protection concerns.

B. Content-Based Restrictions on Truthful, Nonmisleading Commercial Speech Implicate the Same Concerns as Content-Based Restrictions on Noncommercial Speech

In the noncommercial context, this Court has condemned content-based speech restrictions as "presumptively invalid" because they are antithetical to the core interests underlying the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "If there is a

bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control."). These principles, which justify the application of strict scrutiny in the context of noncommercial speech, apply equally in the context of truthful, nonmisleading commercial speech.

As the Court has noted, in the commercial speech context content discrimination not only impedes discussion concerning the various merits of products and services but also inhibits "debate over central issues of public policy" by limiting the public's knowledge of important facts relevant to such debate. *44 Liquormart*, 517 U.S. at 502 (plurality opinion). For example, a near-total ban on cigarette advertising, such as the one at issue in this case, could prevent the public from learning about new types of cigarettes that are specially designed to reduce the risks of getting cancer from smoking—a fact that, in turn, would plainly be relevant to those members of the public trying to decide whether or not (or to what extent) cigarette companies should be regulated by the federal government.

This Court has already acknowledged that content discrimination is no less harmful simply because the restricted speech falls into a category that traditionally receives less than full First Amendment protection. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down as facially invalid a city ordinance which

made it a misdemeanor to " 'place[ ] on public or private property' " any object or symbol which a person knew or had reason to know would " 'arouse[ ] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . .' " *Id.* at 380. Although the Court acknowledged that the ordinance only prohibited expression which fell within the traditionally unprotected category of "fighting words," *id.* at 381, it still struck the ordinance down, reasoning that even traditionally unprotected "fighting words" could not be selectively silenced on the basis of the underlying message expressed. *Id.* at 391.

The Court's holding in *R.A.V.* established that, should the state wish to regulate only some of a particular kind of unprotected (or less than fully protected) expression, it may not distinguish the regulated speech from the unregulated speech based on aspects of the speech's content that have nothing to do with the justifications for affording it no (or less) protection. Thus, "a State might choose to prohibit only that obscenity which is the most patently offensive in its prurience. . . [b]ut it may not prohibit, for example, only that obscenity which includes offensive political messages." *Id.* at 388.

The Court explicitly stated that this principle applied to commercial speech regulations aimed at specific content:

> "[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there . . . . But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

Id. at 388-89 (citing, *inter alia*, *Virginia State Board of Pharmacy*, 425 U.S. at 771-72).

Thus, under *R.A.V.*, the lesser protection for commercial speech means that the state is free to regulate some commercial speech content, but only that content based on "the characteristics of commercial speech that justif[y] depriving it of full First Amendment protection"—such as consumer protection concerns about ensuring a fair bargaining process. *Id.* at 388. It was this principle that Justice Stevens adverted to in *44 Liquormart* when he, along with Justices Kennedy and Ginsburg, effectively endorsed application of strict scrutiny to content-based restrictions on the advertising of alcohol prices, in a case where those restrictions failed to implicate consumer protection concerns:

> "When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."

44 Liquormart, 517 U.S. at 501 (plurality opinion). In that same opinion, the *44 Liquormart* plurality applied this same reasoning to conclude that "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it] with offerors communicating to offerees.' " *Id.* at 499

(quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96, (1977)). *See also Carey v. Population Services International*, 431 U.S. 678, 701 n. 28 (1977) (content-based commercial speech regulations "directed not at any commercial aspect of the prohibited advertising, but at the ideas conveyed" violates the "core of First Amendment values").

The First Circuit's application of *Central Hudson* in this case—in direct contravention of *R.A.V.* and *44 Liquormart*—upheld the content-based cigarette advertising regulations, even though the reason for such content discrimination was wholly unrelated to the consumer protection interests typically cited as the justification for according commercial speech less than full First Amendment protection. Since paternalistic regulations limit content for the sake of purportedly protecting consumers from it—as opposed to concerns about protecting consumers from commercial harms such as false or misleading advertising—they should be subjected to strict scrutiny.

The appellate court in this case explicitly acknowledged that the Massachusetts regulations at issue were content based. *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 42 (1st Cir. 2000). And though the Attorney General proffered Massachusetts' desire to " 'eliminate deception and unfairness in the way [tobacco products] are marketed, sold and distributed,' " *Id.* at 43 (*citing* 940 C.M.R. §§ 21.01, 22.01) as one of the State interests to be analyzed under the *Central Hudson* test, the Court specifically found that the regulations did not directly advance that interest. *Id.* at 49 n. 11. The interests acknowledged by the appellate court—*e.g.*, protection of children from the health hazards of smoking—were unrelated to the consumer protection issues that underlie the rationale for limited protection of commercial

speech in the first place. Nevertheless, the court below upheld the regulations, applying the intermediate scrutiny test of *Central Hudson*. Under *R.A.V.*, however, strict scrutiny should have been applied.[2]

C. *Central Hudson* Has Proven to Be an Unworkable Standard that Fails to Provide the Type of Consistency and Predictability that the First Amendment Requires

As this Court recently noted in its last commercial speech case, *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), because the *Central Hudson* test has proven to be overly-complex, "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." 527 U.S. at 184. But the intricacy of the test was only part of the reason so many esteemed jurists, lawyers, and scholars have called for *Central Hudson*'s reversal. *Id.* Another, more important contributing factor is the fact that the test has proven to be both unworkable and unpredictable. As Justice Thomas explained in his concurring opinion in *44 Liquormart*:

---

[2] A number of lower courts have either applied or considered applying *R.A.V.* to content-based commercial speech restrictions. *See MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (acknowledging potential application of *R.A.V.* to content-based commercial speech regulation); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *R.A.V.* and *Central Hudson* to speech regulation without deciding which is required); *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 n.7 (D.N.J. 1992) ("It is clear from the Supreme Court's decision in *R.A.V. v. City of St. Paul*, that commercial speech must be protected by the usual strictures against content-based restrictions.").

> "The courts, including this Court, have found the *Central Hudson* 'test' to be, as a general matter, very difficult to apply with any uniformity. This may result in part from the inherently nondeterminative nature of a case-by-case balancing 'test' unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test."

44 Liquormart, 517 U.S. at 526-27 (Thomas, J., concurring in part and concurring in the judgment). Several leading commentators have agreed. *See, e.g.*, Kozinski & Banner, 76 Va. L. Rev. at 630 ("[C]ases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not."); David P. Kasakove, *New York State Association of Realtors, Inc. v. Shaffer: When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins*?, 61 Brooklyn L. Rev. 397, 409-10 (1995) ("Rather than giving much-needed direction to the lower courts, the Supreme Court's case-by-case approach [based on *Central Hudson*] has led to such unpredictability that [u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner.") (internal quotation omitted); R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 Denver U. L. Rev. 137, 162-66 (1994) (illustrating the unpredictable nature of commerical cases applying *Central Hudson*).

In the twenty-one years *Central Hudson* has been the law governing commercial speech cases, it has been modified several times but never sufficiently to address the problems inherent in the test. For instance, in 1986, in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court so diluted prong three of the test that it merely required the government to show that it had a reasonable belief that its

speech restriction would in fact advance the government's asserted goal. *Id.* at 341-42. All this changed by 1993, when, in *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court strengthened prong three considerably, now requiring government to affirmatively "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771.

Likewise, prong four of *Central Hudson*, as interpreted in *Posadas*, provided little protection for commercial speech, requiring courts to defer to the legislature's judgment concerning the viability of less speech-restrictive alternatives. *Posadas*, 478 U.S. at 344. Once again, however, in 1993, the Court rejuvenated prong four, holding in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), that it is not met if there are "obvious less-burdensome alternatives to the restriction on commercial speech." *Id.* at 417 n.13. Yet only a few months after *Edenfield* and *Discovery Network* were decided, the Court decided *United States v. Edge Broadcasting Co. T/A*, 509 U.S. 418 (1993), in which it upheld a federal statute prohibiting the broadcast of lottery advertising by broadcasters licensed in states that do not allow lotteries. In that case, the Court seemed to rely more heavily once again on *Posadas*' more deferential standard for prongs three and four. *Id.* at 427-30. Three years later, in *44 Liquormart*—a case in which no opinion of the Court garnered a majority—the Court abandoned *Posadas* altogether, concluding that "*Posadas* erroneously performed the First Amendment analysis." *44 Liquormart*, 517 U.S. at 509.

In the twenty-one years since *Central Hudson* was decided, this Court has heard 19 commercial speech cases (including this case)—an average of almost one case each term.[3] No other First Amendment issue has

[3] *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San*

consumed more time of the Court in this time period. Of the nineteen cases, the Court granted *certiorari* in only one of them—*Greater New Orleans Broadcasting Ass'n*—in order to resolve a circuit split. In the remainder of the cases, review was necessary to clarify and reclarify the confusing and ever-elusive *Central Hudson* standard. If *Central Hudson* is not abandoned, there is little reason to believe that this trend will not continue.

As a result of all of this confusion, *Central Hudson* today means different things in different courtrooms. Some courts have applied the test more stringently, borrowing from this Court's recent, and more protective, line of cases. *See, e.g., Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 99-101 (2d Cir. 1998); *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997). Others, however, like the court of appeals here, continue to rely on this Court's earlier and less speech-protective line of cases. *See also Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1994), *vacated on other grounds*, 518 U.S.

Diego, 453 U.S. 490 (1981); *In re R.M.J.*, 455 U.S. 191 (1982); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489 (1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999).

1030, *readopted on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

Not surprisingly, then, some lower courts have openly criticized *Central Hudson* and have called on this Court to bring more clarity to commercial speech doctrine. The D.C. Circuit has described the *Central Hudson* standard as "perplexing," concluding that, when taken together, the Supreme Court's decisions in commercial speech cases "leave little insight as to what criteria the Court used. . . ." *Kansas v. United States*, 16 F.3d 436, 443 (D.C. Cir. 1994). And in *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997), the Ninth Circuit concluded that, "the *Central Hudson* test is not easy to apply and the cases . . . might suggest it is sufficiently flexible to accommodate 'good' commercial speech and to suppress that which is 'not so good.' " *Id.* at 712.

Unfortunately, the problem of *Central Hudson*'s unpredictability is unlikely to be solved by making yet additional modifications to the test. The problem is with the indeterminacy of the test itself. For instance, the test's third prong requires examination of whether or not the regulation at issue will "in fact" advance the government's substantial interest "in a direct and material way." As one commentator has observed, the courts have contrasted the concept of "direct" advancement with connections that are described as "tenuous, highly speculative, ineffective, only remotely supportive of the government interest, conditional, or involving only limited incremental, speculative or marginal support for the government interest. The potential for these concepts, which are largely just opposing end points on progressive continua, to serve as merely conclusory labels for opposing outcomes is obvious." Wright, 72 Denv. U. L. Rev. at 164-65 (internal footnotes omitted).

The forth prong poses similar problems. That prong requires the regulation to have a "reasonable fit" with its purported ends so that it does not burden more speech than is necessary. But the trade off between a slight reduction in promoting the government's stated interest and a slight reduction in the burden on freedom of speech is far from a precise calculus. The indeterminacy of the test merely "invites the expression of a court's predisposition." *Id.* at 166.

It is not surprising, then, that leading commentators and at least five members of this Court have expressed increasing dissatisfaction with the *Central Hudson* test and have expressed a willingness to reconsider its continued validity. *See 44 Liquormart*, 517 U.S. at 501 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 517-18 (Scalia, J., concurring) (expressing his "discomfort with the *Central Hudson* test," and stating that he is not "disposed to . . . reinforce" it); *id.* at 528 (Thomas, J., concurring) (rejecting application of *Central Hudson* entirely); *see also Rubin*, 514 U.S. at 493 (Stevens, J., concurring) (discussing the "misguided approach adopted in *Central Hudson*"); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes & Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 126 (1996) ("After *Liquormart*, it is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles."); Kozinski & Banner, 76 Va. L. Rev. at 648-52 (calling for the abandonment of *Central Hudson* and adoption of strict scrutiny). In the Court's last commercial speech case, *Greater New Orleans Broadcasting Ass'n*, the Court acknowledged *Central Hudson*'s precarious status, but found it unnecessary to address its continuing viability. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 184. The Court should take this opportunity to provide truthful, nonmisleading

commercial speech with the full First Amendment protection it has always deserved.

CONCLUSION

This case should be analyzed under a strict scrutiny test, and the decision of the Court of Appeals for the First Circuit should be reversed.

Dated: New York, New York
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IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor to Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ADVERTISING FEDERATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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This brief is respectfully submitted pursuant to Rule 37 urging the Court to reverse the decision below of the United States Court of Appeals for the First Circuit on the grounds that Massachusetts' limitations on the public display of tobacco advertising violate the Petitioners' rights under the First Amendment to the Constitution of the United States.[1]

INTEREST OF AMICUS CURIAE

The *amici* herein represent thousands of advertising agencies, advertisers, and others who participate in the advertising industry, as well as business organizations and individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that *amici* present their views to the Court. The *amici* are:

The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are producers and advertisers of consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include: twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

The Chamber of Commerce of the United States of America ("Chamber"), the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members of every size, in every business sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases

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[1] Counsel for both Petitioner and Respondents have consented to the participation of the *amici* in this case, as evidenced by letters filed with the Court pursuant to Supreme Court Rule 37. No party wrote or financially contributed to the preparation of this brief.

involving issues of national concern to American business. This brief is filed because full First Amendment protection to truthful commercial messages about lawful products and services is a matter of profound importance to the Chamber's members.

SUMMARY OF ARGUMENT

The text and history of the First Amendment, as well as the "long accepted practices of the American people," support the view that truthful commercial messages about lawful products and services should be accorded the same constitutional protection as is noncommercial speech. The text, of course, does not distinguish between commercial and noncommercial aspects of the press. The lack of a distinction for constitutional purposes is confirmed by the practice of state legislatures at the time the Bill of Rights was ratified. Although states regulated trade, the only restrictions on advertising concerned the promotion of unlawful activities. This absence of state regulation is consistent with the colonial conception of a "free press," which included advertising, and with the Framer's political philosophy, which equated liberty and property. Full protection of commercial speech is also consistent with the history of the First Amendment, which was adopted in part to bar Stamp Acts that imposed taxes directly on advertising.

Advertising grew essentially unchecked and unregulated throughout the nineteenth century. While the number of states and statutes increased, advertising was barred only where it publicized unlawful products, services, or activities. In addition, towards the end of the century, some restrictions limiting false and misleading advertising were adopted. This Court's treatment of truthful advertising during and immediately after Reconstruction did not distinguish between the treatment accorded other forms of speech.

The Progressive Era witnessed both an increase in the power of advertising and attempts to limit it. But even these attempts overwhelmingly focused on ensuring that advertising was truthful and not misleading. During this time, courts analyzed constraints on commercial speech under the rubric of substantive due process. This confusion of categories caused the Supreme Court

in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to erroneously treat restrictions on advertising as economic regulations subject only to rational basis scrutiny.

That error, which is in part perpetuated by this Court's continued distinction between commercial and noncommercial speech, conflicts with the "long accepted practices of the American people." Those practices—particularly state legislative practice at the times the First and Fourteenth Amendments were ratified—support the contention that truthful commercial messages about lawful products and services are entitled to full First Amendment protection. Under that standard, the advertising restrictions at issue here are plainly unconstitutional.

ARGUMENT

This case involves a challenge to Massachusetts' restrictions prohibiting virtually all outdoor advertising of tobacco products (including indoor advertising visible from the street) within a broadly defined distance of any "park," "playground," or "school," as well as certain point-of-sale advertising regardless of its outdoor visibility. These rules apply even if the ads are truthful, even though they concern a lawful product, and even if most of the people who are exposed to a particular advertisement are adults. Massachusetts argues that these regulations are constitutional because of the need to protect children from positive images of tobacco products. The State's argument stems from the perception that commercial speech occupies some "subordinate position in the scale of First Amendment values." *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). This "subordinate position" is exemplified by this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Amici* demonstrate herein that, throughout most of this nation's history, the American people made no distinction between commercial and noncommercial speech.

Amicus AAF previously addressed the importance of advertising to the historical development of the American press and the concept of free speech. *See, e.g.*, Brief of *Amici Curiae* American Advertising Federation, *et al.*, *44 Liquormart, Inc. v.*

Rhode Island, 517 U.S. 484 (1996) (filed July 6, 1995). Because those points were not fully addressed in the *44 Liquormart* opinion, *amici* bring them again to the Court's attention. In *44 Liquormart*, the Court acknowledged the importance of historical context in unanimously striking down a state prohibition on advertising of liquor prices. *See id.* at 495 (plurality opinion of Stevens, Kennedy, Souter & Ginsburg, J.J.). Justice Thomas, relying in part on the historical analysis of *amici*, rejected the notion that there was any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 522 (Thomas, J., concurring in part and concurring in the judgment) (citing Brief of *Amici*, American Advertising Federation, *et al.*).

Justice Scalia, concurring in the judgment, noted his "discomfort with the Central Hudson test," and his "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 517 (Scalia, J., concurring in the judgment). Justice Scalia found the historical material submitted by AAF, *et al.*, "consistent with First Amendment protection for commercial speech, but certainly not dispositive." *Id.* He stated that "the long accepted practices of the American people" were central to interpreting the First Amendment, including (1) state legislative practices at the time the First Amendment was adopted; (2) state legislative practices at the time of adoption of the Fourteenth Amendment; and (3) "any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field." *Id.* at 517-18.

In this brief, *amici curiae* review the relevant history in an effort to address these issues. The *amici* respectfully submit that the state legislative history and practice, like the available evidence surrounding the understanding of the generation of the Framers, support the proposition that, until relatively recently, the American people did not recognize a distinction in the protections afforded "commercial" and "noncommercial" speech, other than

the advertising of illegal activities and the protections afforded against fraudulent or misleading claims.[2]

I. FULL PROTECTION OF COMMERCIAL SPEECH IS CONSISTENT WITH THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT AND THE PREVALENCE AND IMPORTANCE OF ADVERTISING AT THE TIME OF THE FRAMING.

The development of a free press and of a commercial, advertising-driven press are inextricably linked. *See* Verner W. Crane, *Introduction to Benjamin Franklin's Letters to the Press, 1758-1775,* at xi, xvi (Verner W. Crane ed., 1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would not have occurred to colonial Americans.

A. Advertising Was an Integral Part of the "Press" in Colonial America.

The interrelationship between editorial and advertising content in the eighteenth century press illustrates the fallacy of differentiating for constitutional purposes between commercial and noncommercial speech. American newspapers began to emerge only as colonial business and industry began to grow. *See* Edwin Emery & Michael Emery, *The Press and America* 18 (1978). As small industries developed a need to inform the public of their wares, printers began publishing newspapers to spread that information. As one commentator observed, "[w]ell before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." James Playstead Wood,

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[2] For a more comprehensive discussion of the historical origins of the First Amendment and its application to commercial speech, *see* Daniel E. Troy, *Advertising: Not Low Value Speech*, 16 Yale J. Reg. 85 (1999). The California Supreme Court recently relied on the historical evidence presented here and in that article to find commercial speech entitled to full protection under the California Constitution. *See Gerawan Farming, Inc. v. Lyons*, 101 Cal. Rptr. 2d 470 (2000).

The Story of Advertising 85 (1958). Advertising was a major impetus and means for establishing regularly published newspapers in colonial America.

The majority of advertisements appearing in colonial newspapers would be considered "commercial speech" today. "The colonial press regularly carried reputable medical advertisements, as well as those for books, cloth, empty bottles, corks, and other useful goods and services." Kent R. Middleton, *Commercial Speech in the Eighteenth Century, in Newsletters to Newspapers: Eighteenth-Century Journalism* 277, 282 (Dononvan H. Bond & W. Reynolds McLeod eds., 1977). Without these advertisements, the colonial press so important to the Revolutionary cause would have been less vibrant, if it existed at all because, like today, "[a]dvertising represented the chief profit margin in the newspaper business." Frank Luther Mott, *American Journalism—A History of Newspapers in the United States Through 250 Years: 1690-1960* 56 (3d ed. 1963).

Among the goals of the first attempted colonial newspaper was the promotion of "Businesses and Negotiations." *Publick Occurrences, Both Foreign and Domestick*, Sept. 25, 1690, at 1, *quoted in* Frank Presbrey, *The History and Development of Advertising* 119 (1929). The inaugural issue of the first successful American newspaper contained the following solicitation:

> This News-Letter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c to be Sold or Let; or Servants Run-Away, or Goods Stole or Lost; may have the same inserted at a Reasonable Rate.

Boston Newsletter, Apr. 24, 1704, *quoted in* Wood, *supra*, at 45. The next week's issue of the *Boston Newsletter* contained paid entries that sought the return of two lost anvils, offered a bounty for capturing a thief, and listed a "very good Fulling Mill to be Let or Sold" in Oyster Bay, New York. *Id.* at 45-46.

When the *New Hampshire Gazette* was launched in 1756, its publisher said that the paper would:

> contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect.

New Hampshire Gazette, Oct. 7, 1756 *quoted in* Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 49 (1988). True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy. *See* Lawerence C. Wroth, *The Colonial Printer* 234 (1938). Often, more than half of the standard colonial newspaper was taken up by advertising. In 1766, 70% of Hugh Gaine's *New-York Mercury* consisted of advertising. *See* A. Lee, *The Daily Newspaper in America* 32 (1937).

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements. *See* Presbrey, *supra*, at 161. The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The Boston, New York, and Philadelphia newspapers, like most dailies in these years, "used page one for advertising, sometimes saving only one column of it for reading matter." Mott, *supra*, at 157.

Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal

interest to readers and treated the same. *See* Middleton, *supra*, at 281. As one advertising historian observed:

> Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.

Presbrey, *supra*, at 154. Advertisements were also thought to have independent value in educating and informing the reading public. In the words of prominent printer-historian Isaiah Thomas, editor of a pro-Revolutionary newspaper:

> [A]dvertisements are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328 (1958). As a source of information to the population and income to colonial printers, advertising was influential and plentiful during the latter part of the colonial era.

B. The Absence of Advertising Restrictions Is Consistent with the Colonial Conception of a "Free Press" That Included Advertising.

1. The challenges to early Stamp Acts evidence the colonial conception of a "free press" including advertising.

Given the eighteenth-century equation of liberty and property and the prevalence of advertising in colonial America, it is not

surprising that the very idea of a free press evolved in close connection with the development of advertising. Indeed, one of the major catalysts of the American Revolution involved a defense of advertisements.

As this Court has recognized, one of the best-known statements in defense of a free press—Benjamin Franklin's famous *Apology for Printers*—was written in response to an attack on an advertisement printed by Franklin.[3] Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 174 (Albert Henry Smith ed., 1907). To Franklin, even those "opinions" in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of what is now called commercial speech.

In addition, the British Stamp Act of 1765 assessed a tax on each printed copy of a newspaper and added a two shilling tax for each advertisement therein. As one commentator noted, "[B]y any standard [this amount] was excessive, since the publisher himself received only from 3 to 5 [shillings] and still less for repeated insertions." Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764-1776* 68

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[3] In 1731, Benjamin Franklin printed a politically incorrect advertising notice that was distributed as a stand-alone commercial handbill. The paper proposed a commercial transaction by seeking additional freight and passengers for a ship. At the bottom of the advertisement was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 176 (Albert Henry Smith ed., 1907). This handbill outraged the local clergy (the "Black Gowns"). In response to attacks, Franklin published his *Apology* which was at that time, "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, "Printers and the American Revolution," *in The Press and the American Revolution* 20 (B. Bailyn & J.B. Hench eds., 1980).

(1966). This tax galvanized the colonial press against the British government:

> Stamp duties also, imposed on every *commercial* instrument of writing—on *literary productions*, and, *particularly*, on *newspapers*, which of course, will be a great discouragement to trade; an obstruction to *useful knowledge* in *arts, sciences, agriculture, and manufactures*; and a prevention of *political information* throughout the states.

Objections by A Son of Liberty, New York J., Nov. 8, 1787, *reprinted in* 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed., 1981) (emphasis in original). The opposition of newspapers was based largely, if not primarily, on their concern that the tax encroached on the freedom of expression.[4] Thus, the repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

After the Revolution, and only five years after adopting a state constitution explicitly guaranteeing freedom of the press, Massachusetts enacted a similar stamp tax on newspapers and newspaper advertisements. *See* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 264 (1985) (citing Clyde A. Duniway, *The Development of Freedom of Press in Massachusetts* 132-36 (1966)). These taxes were widely denounced as, in printer Isaiah Thomas's words, an "unconstitutional restraint on the Liberty of the Press." Isaiah Thomas, Essex J., Apr. 19,

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[4] In reacting to the Stamp Act, the Town of Worcester directed its representatives in the Massachusetts Assembly to "take special care of the LIBERTY OF THE PRESS." Schlesinger, *supra*, at 70; *see also* Conn. Gazette, *quoted in id.* (enjoining its readers that "[t]he press is the test of truth, the bulwark the public safety, the guardian of freedom, and the people ought not to sacrifice it"); New York Gazette or Wkly Post-Boy, Nov. 7, 1765, *quoted in id.* at 77 (flaunting its motto, "The United Voice of all His Majesty's *free* and *loyal* subjects in America—LIBERTY, PROPERTY, and no STAMPS.") (emphasis in original).

1786, *quoted in* Carol S. Humphrey, *"That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788*, 14 Journalism Hist. 34, 37 (1987). The 1786 repeal of the ad tax was considered a triumph for press freedom. *Id.*; *see also Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (noting that "[t]he framers were likewise familiar with the then recent Massachusetts episode; and . . . that occurrence did much to bring about the adoption of the [First Amendment]").

2. State trade regulations restricting unlawful products and services only show that the colonial conception of a "free press" included advertising.

The practices of state legislatures around the time of the First Amendment's ratification further evidence that the Framers' generation did not distinguish between the constitutional status of commercial and noncommercial speech.[5] Indeed, state statutes in effect at this time did not restrict truthful commercial messages about lawful products or services.[6] Rather, consistent with the

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[5] All powers not delegated to Congress were reserved to the people and the states. *See* U.S. Const. amends. IX, X. The First Amendment explicitly limited Congress's authority over speech and the press. As such, it is unlikely that the federal government was granted greater power to restrict speech than existed in the states. The fact that, as discussed below, state legislatures did not regulate truthful advertising of lawful products and services suggests that the federal government could not regulate such speech because advertising was regarded as within "the freedom of speech and of the press."

[6] This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. The Public Statute Laws of the State of Connecticut (1808); Laws of Maryland (1811); The Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 23, 1807 (1807); The Laws of the State of New Hampshire (1797); The Laws of the State of New Jersey (1800); Laws of the State of New York (1802); The Public Acts of the General Assembly of North Carolina (1804); Digest of the Acts of the General Assembly of Pennsylvania (1841); The Public Laws of the State of Rhode Island and Providence Plantations (1798); The Public Law of the State of South Carolina (1790); Laws of the State of Vermont (1797); Collection of All Such Acts of the Gener[illegible] Assembly of Virginia (1803). All compilations

constitutions of the ten states that explicitly protected the freedom of the press,[7] advertising was limited only when used to promote products, services, or activities that were themselves unlawful.

Early statutes show efforts to regulate merchants and shopkeepers,[8] liquor and taverns,[9] potash,[10] malt,[11] a variety of commodities,[12] attorneys,[13] and doctors.[14] Among other things,

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(..continued)
are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

[7] Declaration of Rights para. 23 (Del. 1776); Ga. Const. of 1798 art. IV, § V; Declaration of Rights para. 38 (Md. 1776); Declaration of Rights para. XVI (Mass. 1780); Bill of Rights art. 22 (N.H. 1783); Declaration of Rights para. 25 (N.C. 1776); Declaration of Rights para. 12 (Pa. 1776); Declaration of Rights § 7 (S.C. 1778); Declaration of Rights ch. I, art. XIII (Vt. 1793); Declaration of Rights para. 12 (Va. 1776). Pennsylvania and Vermont connected that provision to protection for freedom of speech. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 441 n.55 (1983). Of the remaining four states in existence when the Bill of Rights was ratified, two—Rhode Island and Connecticut—had not drafted state constitutions; two others—New York and New Jersey—did not provide specific state constitutional guarantees of freedom of press and speech. *See* Leonard W. Levy, *Emergence of a Free Press* 189 (1985).

[8] *See, e.g.*, Act for Punishing and Preventing Oppression, 1635 (amended 1730), The Public Statute Laws of Connecticut 544 (1808).

[9] *See, e.g.*, Act Regulating Licensed Houses, 1791, The Laws of the State of New Hampshire 373-76 (1797); Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, 1801, Laws of the State of New York 439-43 (1802); Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, The Public Acts of the General Assembly of North Carolina 122-23 (1804).

[10] *See, e.g.*, Act to Regulate the Exportation of Potash and Pearl Ash, 1792, The Laws of Maryland 191-92 (1811); Act to Regulate Flax-Feed, Pot-ash and Pearl Ash for Exportation, 1785, The Laws of the State of New Hampshire 377-79 (1797).

[11] *See, e.g.*, Act for the Better Making and Measuring of Malt, 1700, The Laws of the Commonwealth of Massachusetts 186 (1807).

[12] *See, e.g.*, Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, 1785, The Laws of the Commonwealth of Massachusetts 320-23 (1807); Act to

these statutes required licenses, prevented charging of unreasonable prices, and set standards for inspection and weighing of commodities. The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, tempered by the doctrine of *caveat emptor*. *See, e.g.*, *Borrekins v. Bevan*, 3 Rawle 23, 27 (Pa. 1831) ("[A] sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they described."); *see also infra* Section I.B.3; *see generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931).

The sole limitations placed on advertising restricted the promotion of certain prohibited activities. For example, during the period surrounding the ratification of the Bill of Rights, several states prohibited or restricted lotteries as well as their advertisement and promotion.[15] Massachusetts, for example,

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(..continued)
Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Fire-wood, and to Regulate the Weighing of the Merchandise in this Province, 1746, The Public Law of the State of South Carolina 208-10 (1790).

[13] *See, e.g.*, Act Regulating the Admission of Attornies, 1785, The Laws of the Commonwealth of Massachusetts 318-19 (1785).

[14] *See, e.g.*, Act to Regulate the Practice of Physic and Surgery, 1783, Laws of the State of New Jersey 7-8 (1783).

[15] *See, e.g.*, Act for the Prevention of Lotteries, 1792, The Laws of Maryland 189-90 (1811) (prohibiting lotteries as well as their 'propos[al] to the public," absent permission of the legislature); Act for the Suppressing of Lotteries, 1791, The Laws of the State of New Hampshire 339 (1805) (separate penalties for setting up a lottery and "aiding or assisting . . . by printing, or any other ways publishing an account thereof"); Act of Feb. 13, 1797, § 1, The Laws of the State of New Jersey 227-28 (1800) (fining those who print, write or publish any account of where tickets are available, or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery"); Act to Prevent Private Lotteries, to remit certain Penalties, and to Repeal the Acts therein Mentioned, 1783, Laws of the State of New York 35-38

enacted a statute in 1785 declaring that, with respect to unauthorized—and therefore illegal—lotteries, the act imposed penalties separate fines for setting up lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had." Act for the Suppression of Lotteries, 1785, The Laws of the Commonwealth of Massachusetts 252-53 (1807), *amended by* Act of Feb. 28, 1801, *id.* at 8-9 (specifying a fine to be levied upon anyone who "shall aid and assist in any lottery established, or erected in any other of the United States, by advertising any Tickets of such lottery for sale, or by publishing the scheme for any such lottery").

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited staging and advertising horse races. *See* Act to Prevent Horse Racing, 1803, The Public Statute Laws of the State of Connecticut 381-82 (1808); Act Against Horse Racing, 1820, A Digest of the Acts of the General Assembly of Pennsylvania 450-51 (1841). And Rhode Island prohibited the erection of a sign "for the keeping of a public house" without first obtaining an innkeeper's license. Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1728, The Public Laws of the State of Rhode Island and Providence Plantations 391-94 (1798). Despite these regulations, however, the state legislatures were not opposed to advertising in general.

(..continued)
(1802) (providing penalties for being "in any ways concerned" with lotteries not authorized by the state, including "printing, writing, or any other ways publishing an account thereof"); Act for Suppressing and Preventing of Private Lotteries, 1762, The Public Law of the State of South Carolina 256-67 (1790) (fining anyone "who shall make, write, print or publish, or cause to be written or published, any scheme or proposal" for a private lottery). Only Pennsylvania completely outlawed lotteries (and their advertisement). *See* Act for the More Effectual Suppressing and Preventing of Lotteries, 1762, A Digest of the Acts of the General Assembly of Pennsylvania 584-85 (1841) (setting 20 pound fine for, *inter alia*, advertising or causing to be advertised any lottery).

3. Common law exceptions to free commercial speech involving false or misleading speech show that the colonial conception of a "free press" included advertising.

The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation (as well as the torts of libel and slander). Sir William Blackstone acknowledged that "every kind of fraud is equally cognizable in a court of law." 3 *William Blackstone Commentaries* *431 (1769). Justice Joseph Story's treatise *Equity Jurisprudence* addressed that "old head of equity," the law of misrepresentation, in detail:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage of him; in every sense there is a positive fraud in the truest sense of the terms.

Joseph Story, *Equity Jurisprudence* § 192 (1836). That liability could accompany this category of speech demonstrates that it was beyond what was understood to be constitutionally protected. A proposed draft of the First Amendment by Thomas Jefferson shows that the free press envisioned by the Framers did not encompass the publication of falsehoods—commercial or noncommercial: "The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations." 15 *The Papers of Thomas Jefferson* 367, 367 (J. Boyd ed., 1958).

Advertisements of unlawful products were also outside the scope of constitutional protection. According to Blackstone, the common law considered it a criminal offense to "procure, counsel, or command another to commit a crime." 4 *William Blackstone Commentaries* *36 (1769) (defining an accessory before the fact); *The King v. Higgins*, 102 Eng. Rep. 269, 276

(K.B. 1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases."); *see generally Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Advertising unlawful products could thus be prohibited at common law as solicitation to commit a crime.

4. Fully protecting advertising is consistent with the Framers' political philosophy, which equated liberty and property.

The inextricable link between commercial and other speech is also reflected in the Framers' political philosophy, which generally equated liberty and property rights. In seventeenth and eighteenth century England there were two reigning justifications for free expression: the idea that free speech "was an instrument to some collective good" and the notion that free speech was a "natural property right of the individual." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 58 (1996).

In this tradition, freedom of speech and property rights were seen as essential parts of an individual's liberty, an understanding derived from the writings of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." John Locke, *The Second Treatise on Government* 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtg. 1975) (1690).[16] As one newspaper commentator put it, "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without

[16] George Mason's Virginia Declaration of Rights evidences this Lockean linkage of liberty and property, stating that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety." Declaration of Rights para. 1 (Va. 1776).

the enjoyment of the other." Boston Newsletter, Feb. 16, 1772, *quoted in* Clinton Rossiter, *Seedtime of the Republic* 379 (1953).

The libertarian Cato drew on Locke in equating liberty and property.[17] Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights:

> This sacred Privilege is so essential to free government, that the security of property, and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own.

John Trenchard & Thomas Gordon, 1 *Cato's Letters* 110 (Ronald Hamow ed., Liberty Classics ed. 1995) (1720-23) (Essay No. 15, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, Feb 4, 1720).

Distinguishing between the value of commercial and noncommercial speech thus would never have occurred to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. James Madison, the drafter of the First Amendment, echoed Locke and Cato, writing:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

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[17] *Cato's Letters* were published from 1720 to 1723 and widely circulated in the colonies as "the most popular, quotable, esteemed source of political ideas in the colonial period." Rossiter, *supra*, at 141. His articulation of the tie between property rights and free speech was enormously influential in colonial America. *See* Smith, *supra*, at 25. In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. *See generally* Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* 3 (Leonard W. Levy ed., 1996)).

> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, a man has a property *in his opinions and the free communication of them.*

James Madison, *Property*, The National Gazette, Mar. 27, 1792, *reprinted in* James Madison, 14 *Papers of James Madison* 266-68 (Robert A. Rutland & Thomas Mason eds., 1983) (1792) (emphasis in original).

This linkage of liberty and property rights strongly suggests that colonial Americans viewed the First Amendment as protecting far more than political speech. As one contributor writing under the pseudonym 'Philalethes" declared in Boston's *Herald of Freedom* in 1788, that Americans:

> are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on every subject[. This] constitutes the dignified character of Americans.

Boston Herald of Freedom, Sep. 15, 1788, *quoted in* Smith, *supra*, at 19. Commercial matters were to be counted among the "subjects" to which the freedom of speech obtained. As leading Anti-Federalist Richard Henry Lee said in his demand for a bill of rights, "A free press is the channel of communication as to mercantile and public affairs." Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962). In keeping with the recognition that the Framers sought to guarantee advertising as a critical part of the press, the text of the First Amendment does not distinguish between commercial and noncommercial aspects of the press.

II. THE PERVASIVENESS OF ADVERTISING AND STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT ARE CONSISTENT WITH THE VIEW THAT COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

An examination of state legislative practices at and around the time the Fourteenth Amendment was ratified confirms that truthful messages about lawful products or services are entitled to full protection. This period marked a robust increase in the prominence and utility of advertising. States, while adopting some restrictions on advertising that reflected the general shift from the common law tradition to statutory law, *see, e.g.*, Morton Keller, *Affairs of State* 347 (1977), continued to focus their regulatory efforts on limiting advertising for illegal products and services.[18]

A. Commercial Speech Was an Integral Part of American Life During Reconstruction.

Advertising was "vigorous and thriving by the mid-nineteenth-century mark." Wood, *supra*, at 158. As one publisher in 1847 observed, "advertising is news. People wanted to read it just as much as they wanted to read the reports of the day's happenings." *Id.* at 159-60. To illustrate, a typical issue of the *New York Herald* in 1860 carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter, only advertising. *See id.* at 166-167; Mott, *supra*, at 397-98, 593-94. Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers. *See* Mott, *supra*, at 397; Presbrey, *supra*, at 259. Nonetheless, even in 1869, the *New York Herald* typically

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[18] This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law at the time of incorporation. The Territorial Codes of Utah, Washington, Wyoming, and New Mexico were also examined. The State Code of Wisconsin could not be found, but the codes of the other thirty-seven states admitted to the union by 1880 were examined.

held eight columns of news, and fifty columns of advertising. *See* Wood, *supra*, at 169.

Although the Civil War may have pushed advertising from the front page, advertising's demonstrated ability to sell Union war bonds led to a vast expansion in its use. *See* Presbrey, *supra*, at 253. A year after the Civil War ended:

> Every rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.

Wood, *supra*, at 182; *see* Presbrey, *supra*, at 255.

Advertising's prominence also led to other innovations including the first advertising agent in 1841, the first newspaper directory in 1869 and the first market survey in 1879. *See* G. Allen Foster, *Advertising: Ancient Market Place to Television* 48-49, 126-31 (1967); Wood, *supra*, at 142. In 1867, *Galaxy Magazine* described advertising in the United States as having arrived at the point at which:

> the names of successful advertisers have become household words where great poets, politicians, philosophers and warriors of the land are as yet unheard of; there is instant recognition of Higg's saleratus and Wigg's soap even where the title of Tennyson's last work is thought to be 'In the Garden,' and Longfellow understood as the nickname of a tall man.

Presbrey, *supra*, at 255. Advertising had become a major part of American culture.

B. State Legislative Practice During Reconstruction Is Consistent with Full First Amendment Protection for Truthful Commercial Speech Promoting Lawful Products and Services.

As advertising emerged as an increasingly powerful societal force, state governments allowed it to grow unchecked, primarily restricting the promotion of illegal products or services only.[19] The few existing advertising restrictions were aimed at the illegality of the advertised conduct, rather than advertising itself. For example, Delaware prohibited advertising by unlicensed lottery retailers. Del. Rev. Stat. ch. 98, v. 12, § 6 (1874). Similarly, Vermont barred the advertising of lotteries "not authorized by the law of this state or of the United States." Vt. Stat. tit. 34, ch. 119, § 7 (1870).

In response to an aggressive anti-abortion campaign beginning in the 1840s, many states adopted extensive abortion restrictions. *See* James C. Mohr, *Abortion in America* 147-170 (1978). Some laws penalized "[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage]." Conn. Gen. Stat. tit. 12, ch. 2, § 25 (1866).[20]

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[19] For example, as before, a number of states restricted lottery advertising. *See, e.g.*, Cal. Penal Code § 323 (1872); Conn. Gen. Stat. tit. 12, § 150 (1866); Del. Rev. Stat. chap. 98, v. 12, § 6 (1874); Digest of Laws of Fla. ch. 80, § 4 (1881); Iowa Code § 4043 (1873); Compiled Laws of Kan. ch. 31, § 342 (1885); Ky. Rev. Stat. ch. 28, art. 21, § 4 (1860 & Supp.); Me. Rev. Stat. tit. 11, ch. 128, § 13 (1884); Md. Code art. 30, § 114 (1860); Miss. Rev. Code § 2605 (1871); Compiled Laws of Nev. § 2498 (1873); N.Y. Rev. Stat. ch. 20, tit. 8, § 53 (1875); Or. Gen. Laws, Crim. Code, ch. 8, § 661 (1874); Compiled Laws of the Territory of Utah § 2002 (1876); Vt. Gen. Stat. ch. 119, § 7 (1870).

[20] *See also* Cal. Penal Code § 317 (1872); Digest of Laws of Fla. ch. 59, § 10 (1881); Compiled Laws of Kan. ch. 31, § 342 (1885); Md. Laws ch. 179, § 2 (1868); Mass. Gen. Stat. ch. 165, § 10 (1860); N.J. Rev. Stat., Crimes § 44 (1874); N.Y. Rev. Stat. pt. 4, ch. 1, tit. 6, § 78 (1875); Ohio Rev. Stat. ch. 2732, § 1 (1860 & Supp.); R.I. Gen. Stat. ch. 232, § 23 (1872); Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876). Notably, these restrictions applied with equal force to all speech regarding abortion, commercial or noncommercial.

Other then-illegal products or activities that could not be advertised included prize fights,[21] and obscene books.[22] Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising. *See* W. Va. Code ch. 149, § 11 (1868); N.Y. Rev. Stat. pt. 4, ch. I, tit. 6, § 77 (1875); Compiled Laws of Kan. ch. 31, § 342 (1885).

Despite the absence of legislation barring false and misleading advertising of lawful products and services, as advertising increased, so too did the recognition that, if false, it could cause harm. Beginning around 1864, certain more successful newspapers refused to accept ads for questionable medicines and quacks. *See* Wood, *supra*, at 180. Many papers warned their readers against disreputable advertisers. In 1872, the national government enacted regulations to restrict the dissemination of fraudulent ads through the mail.[23]

To the extent that this Court addressed issues relating to advertising during and immediately after Reconstruction, its decisions were consistent with the view that advertising should be accorded the same protection as other forms of speech. To illustrate, in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court held that Congress's 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion primarily dealt with Congress's power over the postal system, stating that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." *Id.* at 732. But this Court treated lottery advertisements in the same way that it treated material that today would be fully protected.

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[21] Compiled Laws of Kan. ch. 31, § 338 (1885).

[22] Cal. Penal Code § 311(4) (1872); Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876).

[23] *See* Act of June 8, 1872, ch. 335, 17 Stat. 283 (codified at 39 U.S.C. § 3005 (1994)) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined to have fraudulently obtained money or property via mail).

III. LESSER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DISENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS.

A. The Pervasiveness of Advertising Grew in the Early Twentieth Century.

Advertising experienced unprecedented growth and prestige in the early twentieth century.[24] By 1898, a survey by the *Press and Printer* of Boston counted 2,583 companies that advertised in regular periodicals of general circulation. *See* Presbrey, *supra*, at 362. Advertisements during World War I helped to sell $24 billion in war bonds to 22 million Americans and raise $400 million for the Red Cross. *See id.* at 565. One observer remarked:

> Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success.

Id. at 566.

As was the case after the Civil War, this widespread recognition of the power of advertising in war was not lost on manufacturers and retailers when peace returned. Total investment in advertising soared from $1.5 billion in 1918 to

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[24] The 1904 St. Louis World's Fair recognized the growth of the industry and staged "Ad-Men's Day" with a meeting grandly named "The International Advertising Association." George French, *20th Century Advertising* 119 (1926). Professionalization of advertising continued with the creation of the Advertising Federation of America, which was formed in 1905. *See* Wood, *supra*, at 335. Other advertising groups were formed later, including the New York Advertising League in 1906 and the American National Advertising Managers in 1910. *See* French, *supra*, at 131, 141.

almost $3 billion in 1920 and continued to grow throughout the decade. *See* Wood, *supra*, at 364-365.[25]

B. Disenchantment with Advertising Became Apparent as a Result of Reform Movements and the Great Depression.

As the Gilded Age gave way to the Progressive Era and the notion that civil liberties differed from economic liberties began to take hold, disenchantment with unfettered capitalism, and advertising, grew. *See* Matthew Josephson, *The Robber Barons* 445-53 (1934); *see generally* Richard Hofstadter, *The Age of Reform* (1955). Magazines that had once accepted patent medicine advertisements—such as the *Ladies Home Journal* and *Collier's*—led the charge in 1904 and 1905 against the fraudulent claims made by the industry.[26] *See* Wood, *supra,* at 327-30, 332. Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims. *See id.* at 334. The public outcry against adulterated and dangerous foods and drugs ultimately led to the passage of the Pure Food and Drugs Act of 1906, which forced manufacturers to justify their claims and list product ingredients. *See id.* at 333.

Because of these and other concerns, the advertising industry in 1911 pushed for a model statute barring "untrue, deceptive, or misleading" advertising. Hurnard J. Kenner, *The Fight for Truth in Advertising* 28 (1936). By 1920, thirty-seven states had adopted the Advertising Federation of America's model antifraud statute, *see* Wood, *supra*, at 336, which largely represented a codification of long-standing common-law restrictions on false or

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[25] Part of this growth stemmed from the use of radio as a new advertising medium. Although the first radio ad did not air until 1923, by 1929 the industry received an estimated $15 million in advertising revenues for its roughly 500 broadcast stations. *See* Presbrey, *supra*, at 578.

[26] Other targets of early reformers included billboards and other advertising perceived to be littering the landscape and testimonial advertising by celebrities who did not disclose that a fee had been paid for their endorsement. *See* Wood, *supra*, at 347, 392-93.

misleading commercial messages. *See* William F. Walsh, *A History of Anglo-American Law* 328-329 (1932).

The Depression hit advertising hard in terms of both income[27] and, perhaps more importantly, in public esteem. *See* Wood, *supra*, at 418. Critics charged that advertising was wasteful, merely adding to the consumer's cost. *See id.* at 424. Advertising was attacked because:

> There had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Advertising was to blame, and shrill cries arose for its annihilation.

Id. at 418.[28] This national mood during the Depression spurred calls for increased restrictions on advertising. The federal government aggressively responded to the perceived excesses of advertising through New Deal enactments.[29]

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[27] Following the stock market crash, advertising revenues tumbled from $3.4 billion in 1929 to $1.3 billion in 1933. *See* Wood, *supra*, at 417.

[28] Public skepticism about the role of advertising in the American economy rose significantly. The consumers' movement formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs, Eat, Drink and Be Wary*, and *Partners in Plunder*. *See* Wood , *supra*, at 419-420.

[29] Indeed, Professor Bruce Ackerman has argued that these and other changes brought about by the New Deal amounted to a decisive watershed in constitutional law. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 510-514 (1989); *see also* David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699 (1991) (defining the New Deal as one of three "First Amendment Eras").

C. The Incorrect Association of Advertising and Economic Liberties Led to the Misguided Distinction Between Commercial and Noncommercial Speech.

Although disenchantment among the body politic with economic liberties led to increased state regulation of the economy, this Court initially dampened that sentiment, employing the doctrine of substantive due process to strike down many state laws. Before 1919, the Court treated political speech as subject to the states' police power, power from which economic activities were relatively free. But:

> The Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity . . . . '[F]ree trade in ideas' became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992*, at 100-01 (1996). In contrast to the First Amendment, which this Court had not treated as applicable to constrain state power, the Fourteenth Amendment's due process clause was interpreted to apply to the states.[30]

Thus, most judicial challenges during this period to restrictions on advertising relied on a substantive due process claim that the restrictions interfered with the pursuit of a lawful business rather than advancing First Amendment claims. For example, in *Halter v. Nebraska*, 205 U.S. 34 (1907), this Court upheld a state law barring use of the American Flag on beer bottles. The parties failed even to raise a First Amendment challenge, and instead relied on a due process claim. State courts during this period also analyzed, and in many cases invalidated, challenges to

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[30] It was not until 1931 that this Court first held that the First Amendment applied to the states. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).

advertising regulations under the rubric of substantive due process.[31]

By the time the Court decided *Valentine v. Chrestensen*, 316 U.S. 52 (1942), however, in which it first stated that advertising was outside the protection of the First Amendment, the notion of substantive due process had been rejected, and review of economic legislation reduced to "rational basis" scrutiny.[32] *Valentine*'s dismissive treatment of commercial speech seems most closely linked to the Court's rejection of economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. Thus, what has been said about the Contracts Clause may be said about the protection of commercial speech: "misinterpreted as a form of economic substantive due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded." Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526 (1987).

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[31] *See, e.g., Seattle v. Proctor*, 48 P.2d 238, 239 (Wash. 1935) (striking down a city statute compelling businesses to disclose "the number of such . . . [articles] and the lowest price at which each of said articles were offered for sale to the public prior to said advertisement"); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925) (holding unconstitutional a bar on advertising by dry cleaners without the fire marshal's permission to engage in business); *see also State ex rel. Booth v. Beck Jewelry Enterprises, Inc.*, 41 N.E.2d 622, 626 (Ind. 1942) ("Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment.") (citations omitted).

[32] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis."); *see also* Yassky, *supra*, at 1729-1730 (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's constitutionalization of rights to property and contract). *But see Needham v. Proffitt*, 41 N.E. 606, 608 (Ind. 1942) (striking down statute prohibiting funeral directors from advertising under state free speech guarantee).

Thus, the differentiation between commercial and noncommercial speech is properly understood as an outgrowth of twentieth-century disenchantment with property rights and economic liberties, and the mislabeling of advertising as a substantive due process right rather than a First Amendment freedom. The distinction between commercial and noncommercial speech, however, is inconsistent with the text and history of the First and Fourteenth Amendments, as well as with the long-standing "traditions of the American people."

IV. THIS PROPOSED INTERPRETATION OF THE FIRST AMENDMENT WILL NOT DRAMATICALLY ALTER THE COURT'S FIRST AMENDMENT JURISPRUDENCE.

Removing the distinction between commercial and noncommercial messages is consistent with most commercial speech cases this Court has decided. Indeed, in most cases, the Court has found restrictions on commercial speech to be unconstitutional. *See, e.g., Greater New Orleans Broadcasting Ass'n v. FCC,* 527 U.S. 173 (1999) (holding that the First Amendment protects broadcast advertisements for casino gambling and gambling-related activities when those advertisements are broadcast from states that permit such gaming activities); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down complete statutory ban on price advertising for alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a federal law barring brewers from displaying alcoholic content of their beers on the products' labels); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down a restriction preventing Florida CPAs from making uninvited in-person visits of telephone calls to potential clients); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down a ban prohibiting newsracks used to distribute commercial handbills on public property). This analysis would also have the impact of avoiding the anomalous results that the *Central Hudson* test occasionally allows. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

The proposed interpretation would not, however, prevent government regulation of false and misleading advertising. As shown, the First Amendment has always been understood to allow regulation of such speech. This view is consistent with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where this Court granted First Amendment protection to commercial speech but held that the government had the power to ensure that commercial messages were not false or misleading. *See id.* at 771-72 n.24. Similarly, the government would not be prohibited from restricting advertising of illegal products and services.[33] Thus, affording commercial speech full protection is consistent with the traditional understanding of the First Amendment and is not contrary to the established precedents of this Court.

V. MASSACHUSETTS' RESTRICTIONS ON TRUTHFUL MESSAGES ABOUT A LAWFUL PRODUCT ARE PROHIBITED BY THE FIRST AMENDMENT.

Assessed under the proper level of scrutiny accorded fully protected speech, Massachusetts' restrictions are clearly unconstitutional.[34] The presence of some children in the audience cannot justify these sweeping restrictions. This does not mean that a bar on tobacco ads in *Boy's Life* or *My Weekly Reader* would be unconstitutional. But the government cannot restrict a

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[33] Products and services that could not be advertised in the colonial and Reconstruction eras were prohibited in their entirety (*e.g.*, horse-racing and lotteries). Such activities, when lawful, could be advertised. There is no basis for relying on such statutes to uphold advertising restrictions on products that may lawfully be marketed to the overwhelming majority of the population. *See Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 837 (5th Cir. 1989) (noting that protection of commercial speech "would disappear if its protection ceased whenever the advertised product might be used illegally").

[34] As the Petitioners' brief conclusively demonstrates, however, assessed under the *Central Hudson* analysis, Massachusetts' restrictions are unconstitutional. *See* Petitioners' Brief. Certainly, if the regulations were invalid under this lower level of scrutiny, they would fail under the more searching review required for fully protected speech.

truthful message about a lawful product merely because some of those exposed to the message about that product may not lawfully purchase it. Moreover, Massachusetts' regulations are not sufficiently narrowly tailored to serve the government's interest.

CONCLUSION

For the reasons set forth herein, the Court should reverse the First Circuit's decision. In the process, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as noncommercial speech.

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Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; AND UNITED STATES TOBACCO COMPANY,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

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1999 National Household Survey on Drug Abuse (Substance Abuse and Mental Health Services Administration 2000) 17

C. McDonald, *Children, Smoking and Advertising: What Does the Research Really Tell Us*, 12 Int'l J. of Advertising 279 (1993) 19

Economic Report of the President (1987) 18

Growth Charts: United States (U.S. Centers for Disease Control) 17

Jacob Sullum, *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health* (1998) 19

Preventing Tobacco Use Among Young People: A Report of the Surgeon General (HHS 1994) .. 14, 19, 20

Recommendations for Workplace Violence Prevention Programs In Late-Night Retail Establishments (OSHA 1998) 9, 10

Reducing the Health Consequences of Smoking: A Report of the Surgeon General (1989) 18

Robbery and Violence Deterrence Manual (NACS 2000) 8, 9, 10

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

The National Association of Convenience Stores ("NACS") respectfully submits this brief as amicus curiae in support of the Petitioners in accordance with the provisions of Supreme Court Rule 37. All parties have consented to this filing, and their written consents have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Founded in 1961, NACS is a non-profit trade association representing more than 2,300 retail and 1,700 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience stores, and its retail members own more than 77,000 convenience stores worldwide. These retailers provide consumers with convenient locations to quickly purchase a wide array of products and services, including tobacco, soda, candy, baked goods and snack foods. Nearly 35 percent of the average convenience store's merchandise sales are tobacco products.

If allowed to stand, the decision below upholding the Massachusetts restrictions on tobacco "advertising" would leave most convenience stores in Massachusetts with no effective means to communicate with customers regarding the tobacco products they offer for sale. Extensive restrictions of this nature violate the First Amendment.

SUMMARY OF THE ARGUMENT

First, the Massachusetts regulations violate the First Amendment because they are "more extensive than is

necessary" to advance the State's interest in reducing underage tobacco use. The regulations essentially prohibit all outdoor advertising related to tobacco products in most of the State. These content-based speech restrictions effectively operate as a complete ban on convenience store communications with customers because the alternative communication options are prohibitively expensive and ineffective for small stores that rely heavily on pedestrian and drive-by traffic. (Point I.A.)

Moreover, because of the unique nature of convenience stores, the Massachusetts regulations effectively prohibit all dissemination of tobacco-related information, even inside their stores. That is because the regulations encompass any inside advertisement that can be seen outside the store. To reduce crime, however, the industry has adopted security design standards requiring that the inside of stores be fully visible from the outside. Shelving, product displays and counters are required to be placed below eye level to maximize visibility. These factors together render it virtually impossible for most convenience stores to disseminate tobacco-related information to their Massachusetts customers. They also violate the First Amendment rights of those customers to receive that information. (Point I.B.)

Accordingly, the challenged provisions create a significantly greater impact on convenience stores than they do on other retailers of tobacco products that the State did not even consider. (Point I.C.) There also are less speech-restrictive alternatives available that would more directly advance the State's asserted interest in reducing under age smoking. (Point I.D.)

Second, there is no evidence that the challenged regulations directly advance the asserted state interest in any material way.

There is no logical relationship between posting advertisements five feet above the floor and the State's asserted interest. Even the reports the State purports to rely upon to justify these restrictions acknowledge the lack of any evidence suggesting a relationship between advertising and tobacco consumption. To the contrary, the overwhelming majority of studies conclude that the only impact of tobacco advertising is on inter-brand competition. (Point II)

Finally, the challenged regulations impermissibly restrict the political speech of tobacco companies and their supporters. Such content-based restrictions on political speech are impermissible. (Point III)

ARGUMENT

In an effort to reduce underage tobacco use, the Commonwealth of Massachusetts enacted three sets of regulations that, together, effectively eliminate the ability of most Massachusetts convenience stores to communicate information related to tobacco products to their customers, including those who have a lawful right to purchase such products.[1]

Although the parties disagree as to the appropriate First Amendment test under which these extensive content-based

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[1] The challenged provisions that apply to cigarettes and smokeless tobacco are 940 C.M.R. §§ 21.04(5)(a) & (b), 21.04(2)(c) & (d). The provisions applying to cigars are 940 C.M.R. §§ 22.06(5)(a) & (b), 22.06(2)(c) & (d).

speech restrictions should be evaluated,[2] the challenged Massachusetts regulations fail to pass muster even under the more lenient *Central Hudson* standard. *See Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson*, the Court established a four part test to determine the constitutionality of content-based restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

I. THE CHALLENGED MASSACHUSETTS SPEECH RESTRICTIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE "MORE EXTENSIVE THAN IS NECESSARY."

Under the *Central Hudson* test, a content-based state law that restricts commercial speech is more extensive than is necessary

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[2] Petitioners contend that a strict scrutiny standard applies to the Massachusetts regulations at issue, while the Respondent contends that the lower standard set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) applies. The restrictions on political speech in particular indicate the need for a strict scrutiny standard of review.

if the State does not employ "a means narrowly tailored to achieve the desired objective." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). To satisfy this requirement, there must be a fit between the challenged provisions and the asserted governmental interest that "is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Id.* (*quoting In re R.M.J.*, 455 U.S. 191, 203 (1982)). The extensive restrictions imposed by the challenged Massachusetts regulations do not satisfy this fundamental constitutional requirement.

A. The Challenged Outdoor "Advertisement" Ban Prohibits Most Convenience Stores From Communicating Tobacco-Related Information To Prospective Customers In Massachusetts.

The first set of challenged regulations prohibit all outdoor "advertising" related to tobacco products – including in-store "advertising" that can be seen from outside the store – "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." 940 C.M.R. §§ 21.04(5)(a) (cigarettes and smokeless tobacco), 22.06(5)(a) (cigars). The regulations cover between 87 and 91 percent of the land area of the three largest cities in Massachusetts. *See* Petition For A Writ Of Certiorari, *Lorillard Tobacco Company v. Reilly* at 5 (U.S. S. Ct. 2000) (No. 00-596). Convenience stores are typically located in highly populated areas. The vast majority of Massachusetts' convenience stores will thus be subject to this tobacco products "advertisement" ban.

The regulations also define the term "advertisement" quite broadly, dictating that it includes

> any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette or smokeless tobacco product. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats[.]

940 C.M.R. § 21.03; *see also* 940 C.M.R. § 22.03 (same for cigar "advertisement").

All on-site outdoor advertising by almost all Massachusetts convenience stores is thus banned by the regulations. The only possible alternatives for outdoor convenience store advertisements are off-site billboards located outside of the zone covered by the challenged regulations, and newspaper or magazine print advertisements. As the First Circuit recognized, however, the available alternatives under the regulations are "cost-prohibitive for many vendors of tobacco products such as small groceries and convenience stores." *Consolidated Cigar Corporation v. Reilly*, 218 F.3d 30, 52 (1st Cir. 2000). Most convenience stores will have no ability to inform potential customers that they even sell tobacco products.

Print and outdoor advertisements far removed from the site of the convenience store and outside the reach of the Massachusetts regulations are not only prohibitively expensive for most convenience stores, they also are wholly ineffective substitutes for on-site advertising. One key element of the business of any convenience store is its location – near heavily populated areas and other locations with a large volume of

pedestrian traffic. Many convenience stores also offer gasoline products.[3] For both pedestrians and gasoline customers, on-site outdoor advertising is essential to communicate information – including special offers – about available products.[4]

This Court has specifically held that laws, such as the Massachusetts outdoor advertisement ban, that require the incursion of greater expense to communicate information in a less effective manner are constitutionally suspect. In *Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85 (1977), the Court invalidated a law prohibiting the placement of "For Sale" signs from being placed in front of houses because the restriction did not leave homeowners with satisfactory alternatives to communicate their intention to sell their homes because:

> [t]he options to which sellers realistically are relegated – primarily newspaper advertising and listing with real estate agents – involve more cost and less autonomy than "For Sale" signs[,] are less likely to reach persons not deliberately seeking sales information and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold.

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[3] Approximately 76 percent of convenience stores operated by NACS members also sell gasoline.

[4] The "tombstone" provisions struck down by the District Court that would have permitted the disclosure of information that tobacco products were available would have been an insufficient substitute because the size and style restrictions made it highly unlikely that consumers would be able to see the information, and did not enable retailers to communicate other valuable information such as types, brands, and promotional offerings.

431 U.S. at 93 (citations omitted). The same is true here.

B. The Challenged "Advertisement" Provisions Effectively Prohibit Most Convenience Stores From Communicating Any Tobacco-Related Information To Customers Inside Stores In Massachusetts.

In addition to the provisions discussed above that ban the display of any tobacco-related information inside a retail establishment that can be seen from outside the store, the challenged provisions also require that any in-store tobacco-related advertisements be at least five feet above floor level,[5] and that all tobacco products be kept where they are accessible only to store employees.[6] As explained below, these requirements collectively operate to effectively ban the disclosure of any information about tobacco products.

Convenience stores are typically open 24 hours a day and are concentrated in urban areas. As such they are prime targets of crime. In an effort to address this perplexing problem and to make convenience stores less attractive crime targets, NACS developed a set of security recommendations in 1987 based on research funded by the National Institute of Justice. *See* NACS, *Robbery and Violence Deterrence Manual* at 4 (2000) ("NACS *Manual*").[7] The NACS security recommendations were widely distributed and have become the industry standard. Indeed, when the United States Department of Labor's Occupational

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[5] 940 C.M.R. §§ 21.04(5)(b), 22.06(5)(b).

[6] 940 C.M.R. §§ 21.04(2)(c) & (d), 22.06(2)(c) & (d).

[7] A copy of this most recent version of the NACS *Manual* has been lodged with the Court.

Safety and Health Administration ("OSHA") issued its own set of recommendations in 1998, it incorporated almost all of the primary components of the NACS recommendations. *See* OSHA, *Recommendations for Workplace Violence Prevention Programs In Late-Night Retail Establishments* (1998) ("OSHA *Recommendations*").

According to research used by NACS to develop its recommendations, ensuring good visibility and maintaining good lighting are validated strategies to prevent crime. NACS *Manual* at 7. Visibility is important because "persons outside the store, including police on patrol, should be able to see into the store." *Id.* at 15. In particular, "[t]he customer service and cash register areas should be visible from outside the store. Shelves should be low enough to ensure good visibility throughout the store." *Id.* at 15. These measures also are essential to ensure that employees have "an unobstructed view of the street, clear of shrubbery, trees or any form of clutter that a criminal could use to hide." *Id.* at 15. And, importantly, to maintain visibility, NACS instructs retailers to "not keep product displays higher than eye level." *Id.* at 20.

OSHA concurs with NACS' finding that the physical design of convenience stores can help reduce the risk of robbery and violence. OSHA *Recommendations* at 6. Like NACS, OSHA instructs that convenience stores should be designed so that

> [f]irst, employees should be able to see their surroundings, and second, persons outside the store, including police on patrol, should be able to see into the store. . . . The customer service and cash register areas should be visible from outside the establishment. Shelves should be low enough to assure good visibility throughout the store.

Id. at 6.

The NACS (and OSHA) store-design recommendations have become the convenience store industry standard. From 1993 to 1997, convenience store robberies were reduced by 24 percent. NACS *Manual* at 4. The experience of specific stores that have adopted the design standards has been even more impressive. Adherence to the recommendations in 7-Eleven stores has, for example, resulted in a 70 percent decrease in robberies chain-wide. *Id.*

The challenged regulations effectively prohibit convenience stores that are in compliance with the NACS (and OSHA) store design security standards from conveying any information whatsoever to their customers about the tobacco products they offer. Massachusetts regulations require that any in-store tobacco information be placed at least five feet above floor level. Because of the design features discussed above, virtually all tobacco information displayed within the store above the five foot limit would be seen from outside the store, which would violate Massachusetts' ban on outdoor advertisements. Taken together the outdoor advertising ban and the five foot requirement prohibit convenience stores from communicating tobacco-related information.

The Massachusetts tobacco "advertisement" prohibitions also violate the constitutional rights of consumers – lawful purchasers of tobacco-related products – who have an interest in receiving the tobacco information that convenience stores seek to convey. The First Amendment protects the right of such consumers to receive tobacco-related information –

> the Court's decisions involving corporations in the business of communication or entertainment are not

> only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). The Massachusetts tobacco "advertisement" restrictions severely – and impermissibly – restrict the dissemination of information to consumers about brands and types being offered and their prices.

C. The Challenged Tobacco "Advertisement" Restrictions Have A Disparate Impact On The First Amendment Rights Of Convenience Stores.

The Court has made clear that laws that "select among speakers conveying virtually identical messages are in tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999). The challenged Massachusetts provisions do exactly that.

Convenience stores account for a little more than 50 percent of all sales of cigarette cartons and single packs. Management Science Associates, *Cigarette Unit of Measure - Cartons*, App. 1a.[8] The bulk of the remaining sales are made by supermarkets, mass merchandisers, specialty tobacco stores and drug stores. *Id.*[9]

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[8] Convenience stores accounted for approximately 51.6% of such sales in 1998, and 54.4% in 1999. *See id.*

[9] Approximately 41.6% in 1998 and 39.1% in 1999. *Id.*

As discussed above, the outdoor advertisement ban prohibits convenience stores from disseminating tobacco-related information in an affordable and effective manner. It also essentially is impossible for convenience stores that endeavor to adhere to the NACS (and OSHA) store design security recommendations to communicate tobacco product information inside the store and maintain compliance with the Massachusetts restrictions.

Supermarkets, mass merchandisers, specialty tobacco stores and drug stores, in contrast, can generally comply with the outdoor advertisement prohibitions by placing advertisements in newspapers and magazines. These other retailers also do not generally employ the types of security strategies that NACS recommends for its members. The challenged regulations thus do not effectively ban these other retailers from disseminating tobacco product information in their stores.

The State's interest in reducing underage tobacco use provides no support for placing greater restrictions on the speech of convenience stores than on that of other retail outlets. For example, there is no evidence that minors more frequently view the in-store advertisements of convenience stores – either from outside or inside the stores – than they view the in-store advertisements of supermarkets or drug stores. In fact, given the size of many supermarkets and drug stores, exactly the opposite is likely to be true.[10]

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[10] There also is no evidence that convenience stores are less likely to enforce laws prohibiting tobacco sales to minors. Based on FDA compliance checks conducted between 1997 and 2000, the average rate of violation of FDA regulations regarding identification checks and minimum ages for purchasing tobacco at all retail outlets was 26%. The rate for free-standing convenience stores was 23% and the rate for convenience stores attached to gasoline stations was 27%. Other major retail outlets

Moreover, there is no evidence that the Massachusetts Attorney General even considered this impact on convenience stores in the course of promulgating the tobacco advertisement prohibitions. The failure to carefully calculate such costs associated with restrictions on commercial speech itself demonstrates that there is not a reasonable fit between the restrictions and the asserted State interest. *Greater New Orleans*, 527 U.S. at 188; *Fox*, 492 U.S. at 480.

D. Other Less Restrictive Alternatives Would More Directly Advance The State's Asserted Interest.

The existence of less severe speech-restrictive alternatives also is evidence that challenged content-based regulatory restrictions are not sufficiently tailored as *Central Hudson* requires. In striking down a federal prohibition on the advertisement of the alcohol content of beer in *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995), the Court concluded that "the availability of . . . options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the challenged speech restriction] is more extensive than necessary." 514 U.S. at 491.[11]

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experienced the following violation rates: supermarkets 25%, drug stores 24%, general merchandisers 25%, and tobacco stores 23%. FDA Compliance Checker, www.fda.gov/opacom/campaigns/tobacco/compliancechecker.html.

[11] The less speech-restrictive alternatives identified by the Court that would advance the government's interest in avoiding alcohol content wars between brewers included "directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . or limiting the labeling ban only to malt liquors." 514 U.S. at 490-91.

Similarly, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court invalidated Rhode Island restrictions on price advertising because there were less speech-restrictive alternatives available. 517 U.S. at 507. The alternative measures that the *Liquormart* Court found were "perfectly obvious . . . alternative forms of regulation that would not involve any restriction on speech [and] would be more likely to achieve the State's goal of promoting temperance" included the maintenance of higher prices "either by direct regulation or by increased taxation" and "educational campaigns focused on the problems of excessive, or even moderate, drinking[.]" 517 U.S. at 507.

Massachusetts could employ similar non-speech restrictive strategies – raising the price of tobacco products through regulation or taxation and engaging in increased education campaigns – and it could more strictly enforce current laws against sales of tobacco products to, and possession or use of tobacco products by, minors. Indeed, the Surgeon General has specifically found that such efforts do advance the asserted interest of reducing teen smoking:

> Communitywide efforts that include tobacco tax increases, enforcement of minors' access laws, youth-oriented mass media campaigns, and school-based tobacco-use prevention programs are successful in reducing adolescent use of tobacco.

U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at 6 (1994). In addition, the State also could limit marketing in less speech-restrictive ways by prohibiting only those marketing efforts intentionally directed toward minors or placing advertising restrictions only on retailers that do not

adequately comply with laws against sales to minors. In promulgating the challenged regulations, the Massachusetts Attorney General ignored precisely the kind of less speech-restrictive alternatives that the Court identified in *Coors* and *Liquormart*.

* * * *

Like the restrictions struck down by the Court in *Greater New Orleans*, *Coors*, and *Liquormart*, the Massachusetts regulations are not sufficiently tailored to the State's asserted interest in reducing underage tobacco use to survive scrutiny under *Central Hudson*.

II. THE MASSACHUSETTS PROHIBITIONS DO NOT ADVANCE THE ASSERTED STATE INTEREST.

Central Hudson dictates that restrictions on commercial speech are unconstitutional unless they directly advance the State's interest to a material degree:

> It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) (citations omitted).

The need for the State to demonstrate that its restrictions on commercial speech will directly and materially advance its interests is "particularly great [here] given the drastic nature of its chosen means – the wholesale suppression of truthful, nonmisleading information" by convenience stores. *Liquormart*, 517 U.S. at 505. For that reason, the *Liquormart* Court required the State of Rhode Island to demonstrate that its ban on alcohol price advertising would "*significantly* reduce alcohol consumption." *Id.* at 505 (emphasis in original).

The State argued below that this aspect of the *Liquormart* Court's opinion does not apply here because the challenged Massachusetts regulations do not effect as complete a restriction on advertising as the Rhode Island ban on price advertising. Brief of Defendant-Appellee at 46-47, *Consolidated Cigar Corporation v. Reilly*, 218 F.3d 30 (1st Cir. 2000) (No. 00-1117) ("Mass. App. Br."). As applied to convenience stores, however, the Massachusetts regulations are an even more "drastic" restriction on speech. They prohibit all advertising – not just price advertising – inside and outside convenience stores, leaving convenience stores with no adequate alternative to disseminate to customers information about tobacco products.

The State cannot satisfy this high burden here because there is no evidence that the challenged regulations advance the State's interest in reducing underage tobacco use in any way. Indeed, the available evidence on this point is to the contrary.

The five foot rule bears no logical relationship to the reduction of underage tobacco use. The Massachusetts Attorney General justified the imposition of the five foot rule on the basis of the eye level of minors. *See* Mass. App. Br. at 8. There is

absolutely no evidence, however, that minors in a convenience store are unable to look up to view advertisements.

Moreover, the regulations include mistaken assumptions about the height of the minors with whom the State is concerned. Underage smoking is a problem almost exclusively associated with teenagers, not all minors. "Up to age 20, current cigarette smoking rates increase steadily by year of age, from 2.2 percent at age 12 to 43.5 percent at age 20." Substance Abuse and Mental Health Services Administration, *1999 National Household Survey on Drug Abuse*, § 2.3 (2000). The State's interest in protecting minors from the health effects of smoking therefore increases as minors reach their later teenage years. But the average boy or girl in the United States surpasses the height of five feet before his or her 13th birthday. U.S. Centers for Disease Control (CDC), *Growth Charts: United States,* www.cdc.gov/nchs/about/major/nhanes/growthcharts/clinical_charts.htm. In fact, the growth curves for both boys and girls level out during the teenage years – the average girl grows to within 1 inch of her full adult height before she turns 14 and the average boy reaches the height of the average adult woman around his 14th birthday. *Id.*

The five foot rule thus operates not to keep tobacco information from the view of minors, but, as applied to convenience stores, instead acts to keep it from everyone. The Court has repeatedly held that States cannot, in the name of protecting children, limit adults to "reading only what is fit for children." *Butler v. State of Michigan*, 352 U.S. 380, 383 (1957); *see also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 759 (1996) ("No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify reduc[ing] the adult population . . . to . . . only what is fit for

children.") (citations omitted); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 131 (1989)("Under our precedents, [the challenged regulation] . . . has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

As a more general matter, there is no evidence of a link between advertising and tobacco consumption. As even former Surgeon General C. Everett Koop has conceded, "[t]here is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption." U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: A Report of the Surgeon General* at 516 (1989). Other research in this field has failed to demonstrate that advertising causes minors to smoke. The 1987 *Economic Report of the President*, for example, makes clear that "there is little evidence that advertising results in additional smoking. As with many products, advertising mainly shifts consumers among brands." *Id.* at 186. Another prominent analyst also has remarked on the repeated failure to identify a link between advertising and tobacco use:

> Overall, the evidence that advertising plays an important role in getting people to smoke is not very convincing. In 1991, the economist Thomas Schelling, former director of Harvard's Institute for the Study of Smoking Behavior and Policy, said: "I've never seen a genuine study of the subject . . . . Most of the discussion that I hear – even the serious discussion – is about as profound as saying, 'If I were a teenage black girl, that ad would make me smoke.' I just find it altogether unpersuasive . . . . I've been very skeptical that advertising is important in either getting

> people to smoke or keeping people smoking. It's primarily brand competition."

Jacob Sullum, *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health* at 106 (1998) (citations omitted).[12]

In its brief to the First Circuit, the State nevertheless pointed to two principle sources as evidence that restricting tobacco-related advertising would reduce underage smoking. *See* Mass. App. Br. at 37-38 (discussing U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994) ("1994 Surgeon General Report"), and 1996 Rulemaking Findings made by the Food and Drug Administration, 61 Fed. Reg. 44,396 (1996)). Both sources, however, addressed the effects of advertising on billboards, in print and in other media. The challenged Massachusetts regulations, in contrast, effectively prohibit the dissemination of any tobacco-related information by most convenience stores, including visibly displaying tobacco products in their packaging, listing the prices of tobacco products offered for sale, or in any other way informing customers that tobacco products are available. The State has not identified any evidence that blanket prohibitions on the dissemination of tobacco-related information such as these reduce underage tobacco use in any way.

Moreover, both studies identified by the State affirmatively disclaim the existence of any evidence linking broader

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[12] *See also, e.g.*, C. McDonald, *Children, Smoking and Advertising: What Does the Research Really Tell Us*, 12 Int'l J. of Advertising 279 (1993) ("There is no evidence in any of the studies to suggest that, if advertising were banned, it would make the least difference in the propensity of children to smoke").

advertising efforts with an increase in teen smoking. In his 1994 report, for example, the Surgeon General found that, "[t]o date, [] no longitudinal study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature." 1994 Surgeon General Report at 188.

In its 1996 rule-making proceeding, the FDA also concluded that none of the studies it had examined were

> sufficient to: (1) Establish that advertising has an effect directly causing minors to use tobacco products; (2) determine directionality – that is, did advertising cause the observed effect, or are smokers more observant of advertising . . . or; (3) define terms or disprove the influence of peer pressure in smoking behavior.

61 Fed. Reg. at 44,476 (citation omitted).

The Massachusetts regulations effect a complete ban on point of sale advertising for convenience stores. Even the best evidence presented by the Massachusetts Attorney General does not support the efficacy of a complete ban on in-store advertising as a way to reduce underage smoking. The State has thus failed to sustain its burden of demonstrating that the restrictions it places on speech directly advance its asserted interest in reducing teen smoking in any material way.

III. THE CHALLENGED REGULATIONS ALSO IMPERMISSIBLY RESTRICT POLITICAL SPEECH.

Tobacco companies occasionally display political advertisements regarding policy issues. The R.J. Reynolds

Tobacco Company has, for example, initiated several national campaigns criticizing government smoking policies. One R.J. Reynolds advertisement asked the question –

> Why do politicians smoke cigars while taxing cigarettes?

in front of a backdrop consisting of the colors, logo and a pack of Winston cigarettes with slogans for the brand. App. 2a. The advertisement was a response to the federal government 's plan to significantly increase the cigarette tax, at the same time that then President Clinton was photographed smoking a cigar after the Yugoslavian rescue of an American fighter pilot.

A second R.J. Reynolds advertisement read –

> Even Communists are free to smoke.

in front of the same backdrop. App. 3a. These advertisements are political statements regarding government decisions to tax and otherwise regulate cigarettes.

Such political statements clearly fall within the definition of "advertisements" that are subject to the challenged regulations. The regulations encompass "any oral, written, graphic, or pictorial statement or representation . . . the purpose or effect of which is to promote the use or sale of the product." 940 C.M.R. § 21.03. In addition, "[a]dvertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette or smokeless tobacco product." *Id.*

"The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)). The First Amendment's strong protection of political expression reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).

Any regulation that significantly impairs political speech may be upheld only if it is able to "survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Buckley*, 424 U.S. at 64. Under this standard, the State has the burden of identifying an interest for imposing the regulation that is "compelling." *Elrod*, 427 U.S. at 362; *Buckley*, 424 U.S. at 94; *Bellotti*, 435 U.S. at 786. The State also must "use means closely drawn to avoid unnecessary abridgement of First Amendment freedoms." *Buckley*, 434 U.S. at 25. The Massachusetts regulations are far too restrictive to meet this exacting standard.

CONCLUSION

For the foregoing reasons, NACS urges this Court to reverse the decision of the First Circuit and invalidate the challenged provisions of the Massachusetts regulations.

Respectfully Submitted,

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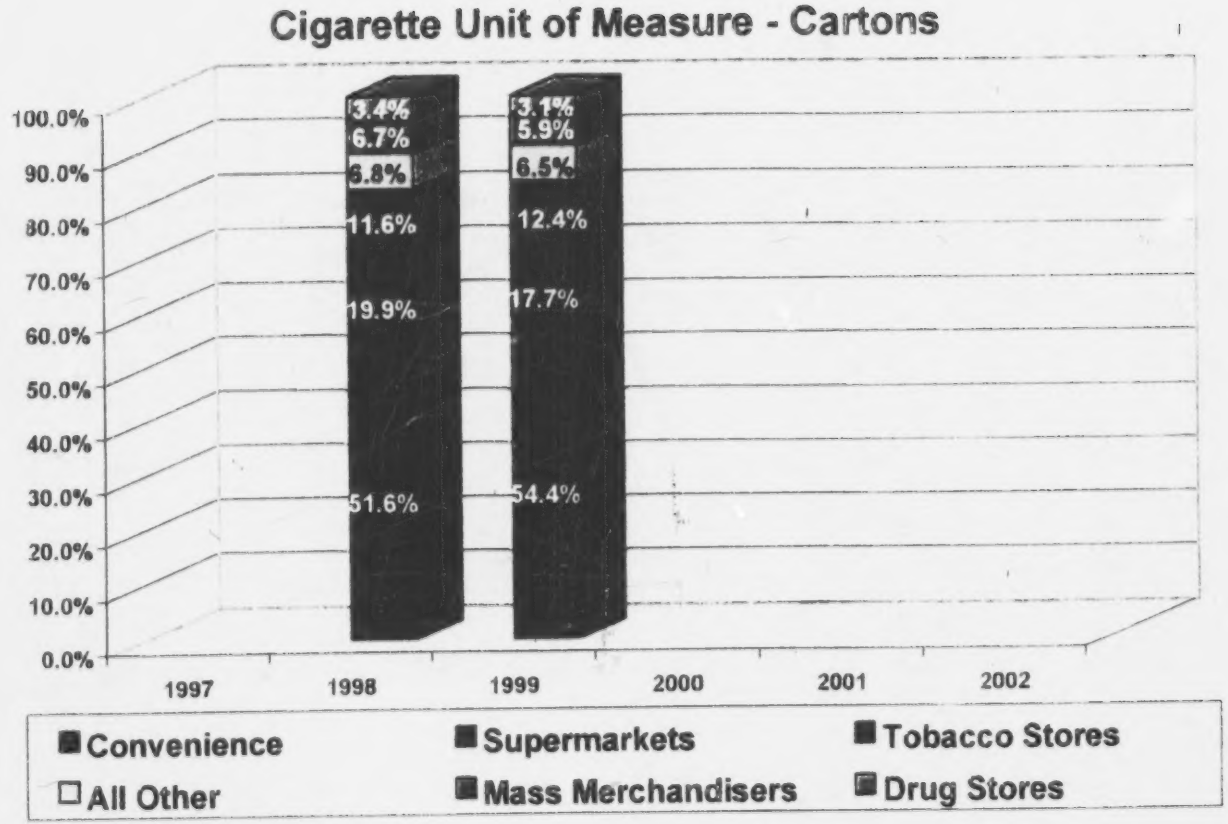

Source: *Management Science Associates (MSA):* Distributor shipments to 126,500 convenience stores. Share data based on unit movement. Data was not available for

2a

Why do politicians
smoke cigars
while taxing cigarettes?
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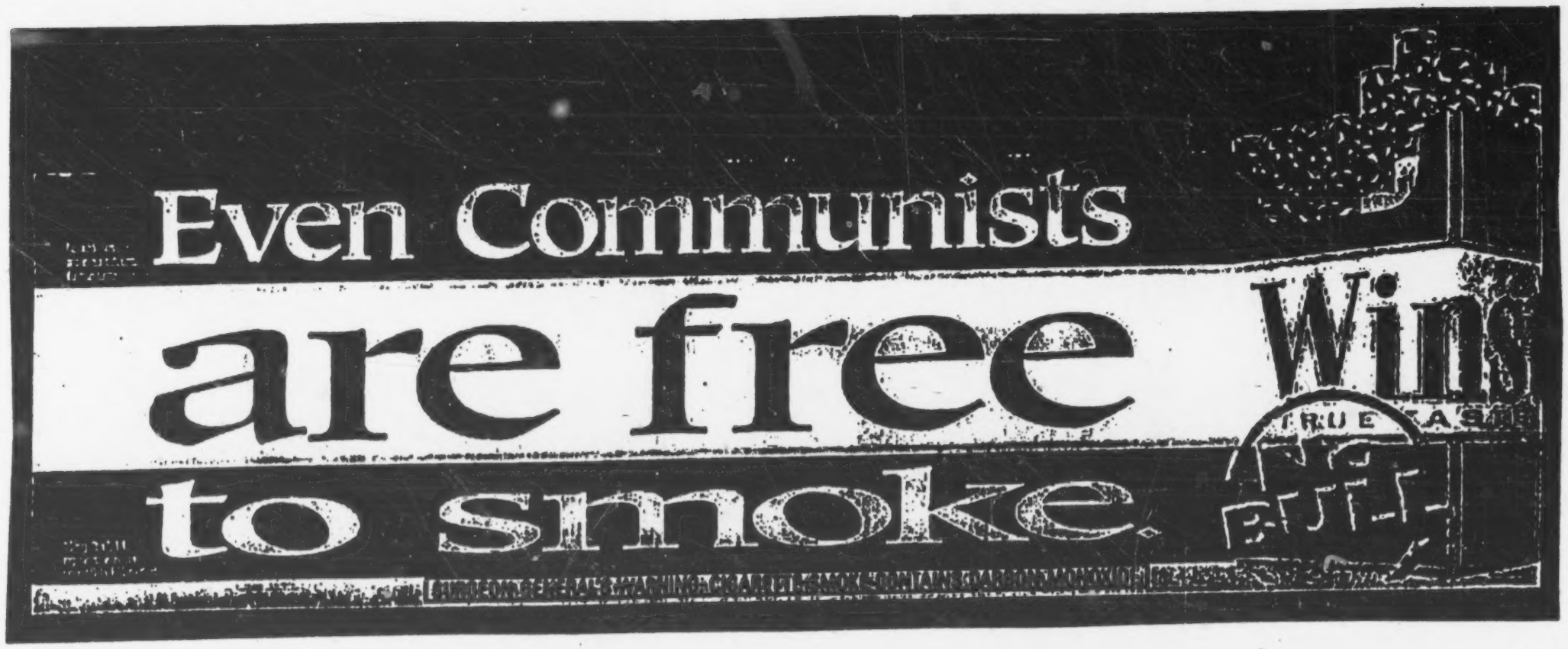
SURGEON GENERAL'S WARNING: CIGARETTE SMOKE CONTAINS CARBON MONOXIDE.



R.J. Reynolds Tobacco Company

MAR 23 2001

Nos. 00-596 and 00-597

Supreme Court, U.S.
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In The

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, et al.,

Petitioners,

– and –

ALTADIS U.S.A., INC., As Successor To Consolidated Cigar Corporation and Havatampa, Inc., et al.,

Petitioners,

v.

THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATE'S ATTORNEY OF DUPAGE COUNTY, COUNTY OF DUPAGE, ILLINOIS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND MASSACHUSETTS ASSOCIATION OF SCHOOL COMMITTEES, IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The primary mission of the DuPage County State's Attorney's Office is to seek justice in each individual case. Joseph Birkett, State's Attorney for DuPage County, Illinois and the more than 175 attorneys, investigators, paralegals and support staff that work in the State's Attorney's Office, ensure the protection of the health and safety of the people of DuPage County, and especially the children of DuPage County, as well as the well being of the victims of crime. These concerns guide trial practice, policy development, program implementation and the actions of the professionals working in the DuPage County State's Attorney's Office.

The County of DuPage, Illinois, consists of approximately 332 square miles located approximately 30 miles west of Chicago. DuPage County is the second largest county in Illinois. With nearly one million residents, the County of DuPage has an active school system. There are 241 public schools in DuPage County, comprised of 164 elementary schools, 36 middle schools, 17 junior high schools and 24 high schools. In this school system, the parents, teachers, administrators and school support personnel of DuPage County educate, train, mentor and advise nearly 200,000 children each year.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief. Consent has been obtained from all parties pursuant to United States Supreme Court Rules to *Amici Curiae* filing this brief. The consent letters have been submitted with this brief.

The Massachusetts Association of School Committees, Inc., (hereinafter "MASC") is a Massachusetts Corporation incorporated under M.G.L. c. 180, and is located in Boston, MA 02109. The members of the MASC consist of approximately 310 Massachusetts school committees comprising cities, towns and regional school districts. The MASC represents the interests of its members in supporting and enhancing public elementary and secondary education in the Commonwealth. The MASC's general interest in the matter presented concerns the statutory authority conferred upon school committees to ban the use of tobacco products in schools, school buses, or school grounds (M.G.L.C. 71, S.37 H). The issues presented to the Court have substantial implications for the MASC's membership.

The National School Boards Association (hereinafter "NSBA") is a nonprofit federation that represents this nation's 95,000 school board members, who in turn serve more than 90 percent of the K-12 students in the nation. Founded in 1940, the NSBA is a federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the United States Virgin Islands. These board members govern 14,722 local school districts that serve more than 46.5 million public school students, approximately 90 percent of all elementary and secondary school students in the nation.

The rights of state and local units of government to take reasonable and necessary measures to ensure the health, safety and welfare of society's children is of profound concern to *Amici Curiae*.

SUMMARY OF ARGUMENT

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

The relief sought by petitioners presents a substantial threat to the ability of state and local governments across this nation to take reasonable and necessary measures to protect the health, safety and welfare of its children.

The petitioners and their *Amici* seek to gain unfettered discretion to peddle cigarettes and other tobacco products wherever and whenever they please.. If successful in their argument, petitioners rights to seek and attain corporate profits from tobacco sales will supercede the rights of mothers, fathers, teachers, principals, school boards, prosecutors and others acting in *parens patriae*, to create safe harbors where children are safe from the devastating effects of tobacco.

To accomplish this end, petitioners urge this Court to adopt an expansive interpretation of the Federal Cigarette Labeling and Advertising Act's preemption provision. Petitioners' arguments are unsupportable because no such preemption exists and this Court has been reluctant to infer preemption where it is not specifically provided under the law.

Petitioners further seek to attain First Amendment protections for tobacco advertising not previously

afforded to any other category of speech, whether political or commercial. This new level of absolute immunity from state regulation sought by petitioners is unprecedented.

Amici respectfully urge this Court to affirm that commercial speech is afforded a lesser constitutional level of First Amendment protection and that Massachusetts may restrict tobacco advertising near schools and playgrounds.

ARGUMENT

I. THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT DOES NOT PREEMPT A STATE'S RIGHT TO PROTECT THE HEALTH AND WELFARE OF ITS CHILDREN BY PLACING REASONABLE LIMITATIONS ON TOBACCO ADVERTISING.

A. Congress Only Reserved To Itself The Authority To Warn The Public About The Adverse Health Effects Of Cigarette Smoking And To Regulate The Content, Format And Placement Requirements For Health Warnings On Cigarette Packages, Advertisements And Billboards.

When Congress enacted the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. Sections 1331 et seq. (hereinafter "FCLAA") it did not reserve for itself the sole authority to govern all tobacco related advertising in the United States. To the contrary, Congress enacted the FCLAA for the limited purpose of ensuring that the public was informed about the health dangers of smoking by regulating advertising and labeling information. *Greater*

New York Metropolitan Food Council v. Giuliani, 195 F.3d 100 (2nd Cir. 1999). The FCLAA provides only a limited preemption and is not intended to serve as an absolute ban on states' rights to limit tobacco advertising. The FCLAA sets forth the clear intent of Congress that the objectives of the statutes were narrowly tailored to meet a specific goal:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health; whereby –
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. Section 1331.

The FCLAA clearly reflects Congress' objective to legislate specific rules to regulate tobacco advertising that were limited to the *context and format requirements for health warnings* on cigarette packages, advertisements and billboards. *Giuliani,* 195 F.3d at 106 (emphasis added). Congress' clear intent to govern and regulate health information and warnings about tobacco products was carried forward into the language of the FCLAA itself,

and in particular in the language of Section 1333. Section 1333 of the FCLAA established detailed requirements for tobacco advertising that carry forth Congress' express desire to ensure that the public was informed about the health dangers of smoking by regulating advertising and labeling information. These requirements included:

- required warning for packages, advertisements and billboards (15 U.S.C. Section 1333(a));
- required label statement formats and outdoor billboard statement formats (15 U.S.C. Section 1333(b)); and
- mandatory Federal Trade Commission approval of how the tobacco industry plans to rotate usage of various required warnings on tobacco product packages, advertisements and billboards (15 U.S.C. Section 1333(c)).

Congress has clearly barred any state from creating legislation or promulgating any regulation that expands or modifies in any way the tobacco product-related warning requirements set forth in the FCLAA. This narrow and limited preemption provision provides:

Sec. 1334. Preemption

- (a) Additional statements
  No statement relating to smoking health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) State regulations
  No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of

> which are labeled in conformity with the provisions of this chapter.

15 U.S.C. 1334.

When the provisions of the FCLAA are read together and taken as a whole, it becomes quite clear that Congress preempted state law in a very limited and narrow area of tobacco advertising. There is no language in the FCLAA that remotely supports the conclusion that Congress intended to summarily preclude any state from enacting reasonable limitations on tobacco advertising where such state laws are wholly unrelated to and do not conflict with the warnings required to be used by the tobacco industry when marketing tobacco products. Moreover, the FCLAA contains absolutely no language that clearly establishes that Congress intended to enact the FCLAA to strip states of their right to protect the health of children within their boundaries by shielding impressionable children from being exposed to tobacco product advertising in and around schools and playgrounds.

United States Courts of Appeals for the First, Second and Seventh Circuits have ruled that the FCLAA does not completely bar a state from enacting laws that restrict tobacco advertising. In *Giuliani, supra,* the United States Court of Appeals for the Second Circuit addressed the issue of whether a New York statute, which was called the "Youth Protection Against Tobacco Advertising and Promotion Act" and which was nearly identical to the Massachusetts regulation at issue in the instant case, was preempted under Section 1334(b) of the FCLAA. The

"Youth Protection Against Tobacco Advertising and Promotion Act" established a ban on the outdoor advertising of tobacco products within one thousand feet of any school building or playground. *Giuliani*, 195 F.3d at 106-07. The court held that the FCLAA did not preempt the New York statute. It reasoned that the purpose of Section 1334(b) was to enable Congress to inform the public of the health risks associated with smoking and, while so informing the public, Congress also sought to protect the national economy from the burden that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards. *See, Consolidated Cigar Corp., et al. v. Thomas F. Reilly*, 218 F.3d 30, 39 (1st Cir. 2000), *citing, Giuliani*, 195 F.3d at 106. The court in *Giuliani* refused to adopt the position that the FCLAA established a comprehensive ban on all state laws restricting tobacco advertising.

The United States Court of Appeals for the Seventh Circuit in *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago*, 189 F.3d 633, 637 (7th Cir. 1999)(hereinafter "FAIR"), also refused to adopt the position that the FCLAA preempted all state laws restricting tobacco advertising. The FAIR court rejected an argument raised by tobacco advertisers that the FCLAA precluded the City of Chicago from restricting the advertising of tobacco and products. The FAIR court concluded that a literal reading of the FCLAA would improperly expand the scope of the FCLAA far beyond Congress' original intent:

> [I]f the FCLAA language ("with respect to advertising and promotion") were viewed with an "uncritical literalism," the effect would be to

> "read Congress' words of limitation as a mere sham, and to read the presumption against preemption out of the law wherever Congress speaks to the matter with generality."

Federation of Advertising Indus. Representatives, Inc. v. City of Chicago, 189 F.3d at 637, *quoting, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). The court then examined the legislative history of the FCLAA and set forth what *Amici* contend is the proper analysis for determining whether a state law is preempted by federal law:

> We therefore must read the language of the FCLAA preemption provision in light of Congress's desire not only to ensure uniformity of regulations with respect to matters of labeling and advertising, but also in light of the manifest congressional concern in preserving for the states the remainder of their traditional police powers.

Federation of Advertising Indus. Representatives, Inc. v. City of Chicago, 189 F.3d at 638. The FAIR court reaffirmed the traditional rule that the placement and manner of outdoor advertising is a matter of traditional local concern and as such concluded that state law was not preempted by the FCLAA. *See, Consolidated Cigar Corp., et al. v. Thomas F. Reilly*, 218 F.3d at 40-41.

The United States Court of Appeals for the First Circuit reviewed the Massachusetts regulations that are at issue before this Court and refused to expand the limited preemption Congress established in the FCLAA. In *Consolidated Cigar Corp., et al. v. Thomas F. Reilly, supra*, the court found the courts' analysis in *Giuliani* and *Federation*

of Advertising Indus. Representatives, Inc. on the preemption issue compelling. The court ruled that the FCLAA did not preempt Massachusetts' tobacco advertising regulations because the regulations did not interfere with the labeling and advertising scheme established by Congress. *Consolidated Cigar Corp., et al. v. Thomas F. Reilly,* 218 F.3d at 41. The court reasoned:

> [T]o the extent that they [the Massachusetts regulations] create differing restrictions on the location of advertising in various states and municipalities, such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country. We do not consider such location restrictions to present the kind of "diverse, nonuniform, and confusing" advertising standards with which Congress was concerned when it enacted the FCLAA.

Consolidated Cigar Corp., et al. v. Thomas F. Reilly, 218 F.3d at 41.

The FCLAA's language and legislative history demonstrate that Congress did not intend to reserve for itself the sole authority to govern all tobacco-related advertising in the United States. The plain language of the FCLAA establishes that Congress enacted the FCLAA only for the limited purpose of ensuring that the public was informed about the health dangers of smoking by regulating advertising and labeling information. The FCLAA preempts state law in only a very limited fashion and clearly does not create an absolute ban on states' rights to limit tobacco advertising.

B. This Court Has Consistently Refused To Infer An Unexpressed Preemptive Purpose Into Federal Laws To Strike Down State Statutes, And Therefore The Tobacco Industry's Expansive Interpretation Of The FCLAA's Preemption Provision Should Be Rejected.

Amici urge this Court to flatly reject petitioners' expanded interpretation of the FCLAA. *Amici* respectfully request that this Court maintain its long standing commitment to examine statutes as a whole and in the full context in which the statute was enacted to determine the true meaning and application of a particular law. This comprehensive approach is of the highest importance where the rights of states to regulate tobacco advertising near school and playgrounds are at stake.

Justice Story aptly stated the cardinal rule, which is that the federal government can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be as such as are expressly given, or given by necessary implication. *See generally, Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). This Court has consistently refused to infer that a federal law preempts state law where the federal law does not specifically reserve for Congress the right to regulate or to govern a particular subject matter. *See generally, Cippollone, supra, citing, Medtronic v. Lohr*, 518 U.S. 470 (1996). In *Penn Dairies v. Milk Control*, 318 U.S. 261 (1943), this Court maintained that an unexpressed purpose of Congress to set aside state statutes that regulate local affairs is not lightly to be inferred and ought not to be applied where the legislative

command read in the light of its history remains ambiguous. Similarly, in *Great Lakes Dredge and Dock Co. v. Charett*, 319 U.S. 293 (1943), this Court stated that the powers of a state to govern men and things will not be lightly stricken down by implication.

To determine whether a federal statute supercedes a state law or whether Congress has occupied a given field in such a way as to exclude the operation of state laws, the entire scheme of the federal statute must be considered and whether the Congress has excluded state action in a particular field depends on the facts in the particular case and the congressional intent, irrespective of the coincidence of terms or words that may be used in both the state and federal statutes. *People of the State of California v. Zook*, 336 U.S. 725, *reh'g denied*, 337 U.S. 921 (1949). The nature of the power executed by Congress, the object sought to be attained, and the character of the obligation imposed by law are important in determining whether supreme federal enactments preclude the enforcement of state laws on the same subject. *Hines v. Davidowicz*, 312 U.S. 52 (1941).

Judge Learned Hand recognized the dangers of examining portions of statutes out of context. Judge Hand understood that unintended consequences can result where a court applies a strict literal interpretation to particular words within a statute without consideration of the entire statute. Judge Hand cautioned:

> [t]here is no more likely way to misapprehend the meaning of the language – be it in a constitution, a statute, a will or a contract – than to read the words literally, forgetting the object

> which the document as a whole is meant to secure.

Giuliani, 195 F.3d at 105, *citing, Central Hanover Bank & Trust Co. v. Commissioner*, 159 F.2d 167, 169 (2nd Cir. 1947).

Here, petitioners' pray that this Court will ignore the wisdom of Judge Hand, discard Congress' true intent when it enacted the FCLAA, and adopt the petitioners' expanded interpretation of the preemption provision in the FCLAA. *Amici* urge this Court to reject this expansive interpretation of the FCLAA's preemption provision. Because the FCLAA does not contain the express preemption of state tobacco restrictions, none should be inferred by this Court.

C. The Massachusetts Tobacco Advertising Restrictions Do Not Conflict With The FCLAA And Thus They Are Not Preempted By The FCLAA.

The Massachusetts tobacco regulations restrict tobacco advertising around schools and playgrounds, where children assemble to play and learn. The FCLAA, on the other hand, creates the universe of the nature and types of warnings that the tobacco industry is required to employ when packaging tobacco products and advertising these products to the general public. There is no connection, and certainly no conflict between the State of Massachusetts' goal of protecting children from the harmful effects of tobacco products and Congress' desire to create a uniform and nondiverse national program for cigarette warnings on tobacco packaging and advertising. Where no conflict exists between a state law and federal

law that address the same general subject area, the federal law does not preempt state law.

The Supremacy Clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land." U.S. Const. art. VI, cl. 2. Accordingly, the "relative importance to the State of its own law is not material when there is a conflict with a valid federal law." *Felder v. Casey*, 487 U.S. 131, 138 (1988). Any state law that is clearly within a State's acknowledged power, but that interferes with or is contrary to federal law, must yield. *Felder*, 487 U.S. at 138. Hence, a state law at odds with federal law is preempted by federal law.

Conversely, where the state law does not conflict with federal law, the state law is not preempted by federal law. In the instant case, there is no real or apparent conflict between the Massachusetts tobacco advertising restrictions and the FCLAA. The Massachusetts tobacco regulations restrict tobacco advertising in locations heavily populated by young children such as schools and playgrounds. These state regulations do not alter or affect Congress' labeling strictures that involve the general marketing of tobacco products to adults. The FCLAA mandates the use of specific warning labels when tobacco industry packages and advertises tobacco products. The purpose and effect of the state regulations and the FCLAA do not intersect. Accordingly, there is no conflict between the two that justifies preemption of the Massachusetts regulations.

Moreover, the Massachusetts tobacco advertising restrictions do not frustrate Congress' ability to carry out the purpose of the FCLAA. In order to invalidate a state statute under the supremacy clause, a court must first conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. *Colorado Antidiscrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). Congress will be deemed to have intended to supercede local law when and only when the local law in terms of its practical administration conflicts with the act of Congress or plainly and palpably infringes on policy. *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). The Massachusetts regulations do not hamper Congress' ability to regulate health warnings on cigarette packages, advertisements and billboards. Accordingly, the FCLAA does not preempt the Massachusetts regulations.

II. A STATE MAY RESTRICT COMMERCIAL ADVERTISING OF TOBACCO PRODUCTS TO PROTECT THE HEALTH AND SAFETY OF CHILDREN WITHIN ITS GEOGRAPHIC BOUNDARIES.

A. The Health And Safety Of Children Constitutes A "Substantial Interest" Which Clearly Justifies A State's Right to Restrict Tobacco Advertising Near Schools And Playgrounds.

It is beyond dispute that states have broad power to establish and enforce standards of conduct within their borders relative to the health of everyone there. *See generally, Barsky v. Board of Regents*, 347 U.S. 442 (1954). It is a vital and integral responsibility within the state's police

power. *Id.* There can be no doubt that upon the proper occasion and by the appropriate means, a state may regulate a business and any of its aspects. *Nebia v. New York,* 291 U.S. 537 (1934).

Amici aver this is especially true when activities of the business may have a detrimental and harmful impact on the health and safety of children. This Court has affirmed this view and has consistently recognized that a government may act more protectively where children are concerned. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975). The law is well-settled that a state or municipality can adopt more stringent controls on communicative materials available to children than on those available to adults. *Erznoznik,* 422 U.S. at 212. Children deserve special solitude in the First Amendment balance because they lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke,* 101 F.3d 325, 329-30 (4th Cir. 1996).

This Court has long undertaken the role of a champion of protecting children's health and welfare in numerous cases where the interests of children were balanced against commercial free speech interests. In *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), this Court approved extra restrictions on speech on the radio because of the pervasiveness of the medium and the presence of children in the audience. In *Ginsburg v. New York,* 390 U.S. 629 (1968), this Court sustained a law which protected children from non-obscene literature. And while this Court has acknowledged a right to private possession of mature entertainment materials in private residences, *see generally, Stanley v. Georgia,* 394 U.S. 557,

566 (1969), this Court has allowed stringent legislative responses to "destroy a market for the exploitative use of children." *Osbourne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This Court has afforded children this special safeguard to ensure that children do not become lost in the marketplace of ideas. *See generally, Anheuser-Busch*, 101 F.3d at 330.

The potential ramifications of the instant case pose a real threat to the healthy, well-rounded growth of society's children. The devastating effect that tobacco advertising has on children when it is situated near schools and playgrounds has been studied and well-documented.

In 1994, the United States Surgeon General published a report entitled *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* which concluded "Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking" and "cigarette advertising appears to increase young people's risk of smoking." JA 102-103. This report further found that among all persons who had ever been daily smokers, 81.9% first tried a cigarette before age 18. JA 103.

In 1995, the Food and Drug Administration (hereinafter "FDA") performed an analysis of the evidence relating cigarette and smokeless tobacco advertising to children's smoking initiation and concluded:

> The agency concludes that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: 1) A causal relationship between advertising and youth smoking behavior; and 2) a positive effect of stringent advertising measures on smoking rates and on youth smoking. . . . Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption. Therefore, the agency finds that stringent restrictions on advertising are *essential* if smoking by adolescents is to be reduced.

JA 103 (emphasis added).

In 1994, the National Academy of Science's Institute of Medicine issued a report entitled: *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths* which concluded that tobacco advertising and promotion undoubtedly contribute to the multiple convergent psychosocial influences that lead children to begin using tobacco products and to become addicted to them. JA 104.

A 1991 study entitled "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children" published in the *Journal of the American Medical Association* reported that in just three years after Camel's Old Joe cartoon character advertising campaign began, the proportion of smokers

under 18 years of age who chose Camel brand cigarettes rose from 0.5% to 32.8%. JA 111-112.

These studies clearly establish that tobacco advertising severely impacts our nation's children and has grave and serious consequences with regard to their health. These serious health concerns clearly constitute a "substantial interest" to Massachusetts.

The federal government has no monopoly over the regulation of local advertising where such advertising threatens the health and safety of children. Massachusetts, just as each and every other state in this nation, has broad police power to adopt tobacco advertising restrictions designed to protect the health and safety interests of its citizens, and especially of its children. Congress left to the states local police powers to protect their children when it created the limited preemption in the FCLAA. Congress' actions are consistent with this Court's teachings in *Townsend v. Yeomans*, 301 U.S. 441, 451 (1937), where this Court stated that a state, acting within its sphere, is presumed to best know the needs of the people within its boundaries. *Amici* respectfully request that this Court continue to protect states' rights to protect the health and safety of their children by ruling in favor of respondent.

B. The First Amendment Is Not Absolute And Thus Tobacco Advertising Is Not Immune From State Regulation.

Since this Court rendered its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), commercial speech has been afforded

some level of protection under the First Amendment from unwarranted governmental interference. Petitioners and their *Amici* hope to expand this Court's ruling in the *Virginia Pharmacy Board* case to such a degree that all tobacco advertising will be virtually immune from any and all state regulation. In other words, petitioners' and their *Amici* seek to elevate tobacco advertising to a degree that goes even beyond constitutional protections that are traditionally afforded to political speech. The petitioners' wishes are contrary to prior decisions made by this Court and should be rejected.

This Court has long afforded substantial constitutional protection only to true political speech where, unlike tobacco advertising, profit is not the central motive. For example, this Court has long held that the First Amendment shields such acts as saluting the flag as well as refusing to do so. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). The First Amendment shields an individual's right to wear an armband to protest a war. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969). This Court has held that displaying a red flag is also protected under the First Amendment, *Stromberg v. California*, 283 U.S. 359, 369 (1931), as well as "marching, walking or parading" in uniforms displaying the swastika. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). The speech in each of these cases sought to advance traditional notions of political thought, protest and societal change. Tobacco advertising, on the other hand, seeks to generate profits for the tobacco industry.

However, even true political speech is not immune from governmental restriction. This Court has refused to

extend unlimited First Amendment protection to all forms of political speech even though this nation treasures political speech as the cornerstone of its democracy. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the legislative branch's limitations on campaign contributions. This Court reasoned that the potential for corruption and the avoidance of the appearance of improper influence was a sufficiently important concern to justify legislative limitations on campaign contributions. Similarly, in *Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al.*, 528 U.S. 377 (2000), this Court again upheld as constitutional state limitations on campaign contributions despite the political nature of the donations. This Court reasoned that the danger of corruption in the electoral system is a sufficient state interest to uphold limitations placed on campaign contributions.

It is important to note that this Court has also restricted other forms of speech where profit was not the central motive and where the speaker asserted that their speech was, in a broad sense, an "exchange of ideas." In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court ruled that fighting words fall beyond the scope of the First Amendment. In *Beauharmais v. Illinois*, 343 U.S. 250 (1952), this Court ruled that group libel is not afforded protection under the First Amendment. Similarly, in *FCC, supra*, 438 U.S. at 726, this Court denied constitutional protection to indecent speech. A similar conclusion was reached by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) with regard to defamatory falsehood.

This Court has recognized that commercial speech, like tobacco advertising, may be restricted in certain circumstances because commercial speech is not afforded the same, heightened level of protection under the First Amendment traditionally given to political speech. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). This Court has recognized the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ohralik*, 436 U.S. at 455-456.

The petitioners and their *Amici* in essence have asked this Court to grant the tobacco industry unfettered discretion to peddle cigarettes and other tobacco products wherever and whenever they please, even nearer to the front steps of schools. No such absolute right has previously been extended to commercial speech by this Court. If successful in their argument, petitioners' rights to seek and attain corporate profits from tobacco sales will supercede the rights of mothers, fathers, teachers, principals, and those acting in *parens patriae* of children to create a safe harbor where children can be safe from the devastating effects of tobacco.

C. A State's Restrictions On Tobacco Advertising Pass Constitutional Muster If They Have A Reasonable Relation To The Goal Of Protecting Children's Health.

Once a state has identified a substantial interest that supercedes the First Amendment protections afforded to commercial speech, the state is not required to employ

the least restrictive means to promote that substantial interest. *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989). Here, Massachusetts has established that the health and safety of children living within its boundaries, and the negative effect tobacco advertising has on the health of children, are substantial interests that supercede any First Amendment protection that tobacco advertising may have otherwise had in the absence of these substantial interests. Massachusetts is not required to seek out and use the least restrictive means available to protect children from the negative effects of tobacco advertising.

Petitioners and their *Amici* have suggested that a state is required, or should be required, to apply the least restrictive means test when restricting commercial speech. *Amici* recognize that this Court in dicta in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) suggested that the least restrictive means test be applied in commercial speech cases. However, this Court did not adopt the least restrictive means test in its holding in *Central Hudson*. Furthermore, this Court has not adopted the use of the least restrictive means test in any subsequent commercial speech case. To the contrary, this Court has specifically held that the least restrictive means test is not required in commercial speech cases. *Fox, supra.*

Justice Scalia, writing for the Court in *Fox*, emphasized that commercial speech is afforded lesser protection in the spectrum of First Amendment protections. *Id.* Therefore, Justice Scalia concluded that to apply the least restrictive means test would raise commercial speech to a higher level of First Amendment protection than it has

been previously afforded by this Court. *Id.* Jusice Scalia stated:

> In sum, while we have insisted that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," . . . we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decisionmakers to judge what manner of regulation may be best employed.

Id., citing, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) *and citing In re R.M.J.,* 455 U.S. 191 (1982).

Massachusetts is not required to use the least restrictive means to protect children from the adverse health effects of tobacco advertising. Massachusetts is required only to demonstrate that its tobacco advertising restriction is reasonably related to protecting childrens' health and that its tobacco restrictions are narrowly tailored to achieve that purpose.

The Massachusetts regulations at issue here clearly satisfy this Court's test. The regulations were promulgated after the Massachusetts Attorney General thoughtfully consulted the volumes of studies that conclude tobacco advertising has a negative impact on children. The regulations impose advertising restrictions only in those limited areas where it is certain that large groups of children regularly go – schools and playgrounds. These regulations do not restrict the tobacco industry from peddling its products in any other geographic region beyond the narrowly tailored 1000 foot zone established by the regulations. Massachusetts' regulations clearly satisfy this Court's "reasonableness" test as set forth in *Fox*, and therefore should be upheld by this Court.

CONCLUSION

Amici Curiae County of DuPage, Illinois, National School Boards Association and Massachusetts Association of School Committees respectfully request that this Court continue its role in protecting the health and safety of this nation's posterity by ruling in favor of Respondent Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts.

Respectfully submitted,

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Lorillard Tobacco Co., et al.,
Petitioners,

v.

Thomas F. Reilly,
Attorney General of Massachusetts,
Respondent.

Ataladis U.S.A. Inc., et al.,
Petitioners,

v.

Thomas F. Reilly,
Attorney General of Massachusetts,
Respondent.

On Writ of Certiori to the United States
Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* TOBACCO CONTROL RESOURCE CENTER, INC. IN SUPPORT OF RESPONEDENT

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INTEREST OF AMICUS CURIAE

Letters from the parties granting consent for this brief have been filed with the Clerk of this Court.

The interest of the Tobacco Control Resource Center ("TCRC") in this case arises from its mission to improve public health by reducing the use of and exposure to tobacco products and smoke in the United States and internationally. Begun in 1979 and a 501(c)(3) nonprofit since 1984, the TCRC has experience in tobacco control issues generally, as well as longstanding and specific expertise in the legal and policy issues relating to tobacco control and public health. The TCRC attorneys provide tobacco control analysis and education for federal and state regulatory bodies, federal and state representatives, municipalities, boards of health, non-governmental organizations, and litigators involved in tobacco products liability.

Professor Richard A. Daynard, of the TCRC, filed an *amicus* brief in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), co-representing six former United States Surgeons General, the American Council for Science and Health, and the Tobacco Products Liability Project. The TCRC has also filed an *amicus* brief in the Supreme Judicial Court of Massachusetts in *Tri-Nel Management Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001) (upholding board of health authority to regulate smoking in public places).

The TCRC can assist the Court in its analysis of the regulatory provisions at issue here featured in Massachusetts Regulations Title 940, Chapters 22.00; 22.00. In August of 1999, the Robert Wood Johnson Foundation awarded the TCRC a grant entitled "Cigar Regulation and Other Legal Interventions to Reduce Cigar Use," which has funded law review articles describing the marketing and sales practices common to cigar retail.[1] This brief focuses on the cigar-related regulatory provisions at issue.

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[1] This grant has funded the writing of this brief *amicus curiae* as well. *See Grant No. 037857,* Robert Wood Johnson Foundation, Substance Abuse Policy Research Program, Dept. of Pub. Health and Sciences, Wake Forest Univ. School of Medicine.

SUMMARY OF ARGUMENT

An investigation by the Massachusetts Department of Public Health has revealed that cigarette advertisements occur with alarming frequency near elementary and middle schools, evincing a scheme designed to entice youth to illegally obtain cigarettes. The Centers for Disease Control and Prevention ("CDC") have also found that cigars are the second most popular tobacco product after cigarettes among underage users. The Commonwealth's response to these investigations was to include cigars in its effort to combat illegal sales of tobacco products. This brief outlines the current data around cigar marketing and sales, which support inclusion of cigars in the Commonwealth's consumer protection regulations.

The advertising and sales practices for cigars by retailers now largely mimic those for other tobacco products, including cigarettes. Studies by a major Massachusetts municipality and by the Federal Trade Commission ("FTC") show that up to 11% of all tobacco advertising at general-use retail stores is dedicated to cigars and that leading cigar companies supported this form of advertising through generous promotional allowances and creating point-of-sale advertisements. The unchecked access to tobacco products through "self-service displays" is also common to the retail sales of cigars.

Restricting access to cigars will not impede lawful communication. Instead, cigars may be displayed in any retail establishment, if physical access to cigars or the area where cigars are displayed is restricted to adults. Additionally, the Massachusetts Attorney General's regulations allow cigars to be displayed in a manner that allows adult patrons access to hold, smell, and otherwise inspect cigars under controlled circumstances.

The United States Supreme Court has signaled that it may review and revise the intermediate level of scrutiny that it gives to certain commercial speech restrictions as set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 328 (1980). The Massachusetts Attorney General's regulations should survive judicial scrutiny under either the intermediate scrutiny test set forth in *Central Hudson* or stricter scrutiny as applied to commercial speech, such as those suggested in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

In the instant case, the Attorney General's regulations are not a prohibition as they allow numerous alternative channels of communication in mass media and in stores, and thus should be subject to an intermediate level of scrutiny. Moreover, the Attorney General's regulations are in furtherance of a substantial government interest in commercial matters, namely, "the preservation of a fair bargaining process." In furtherance of this interest, the Attorney General's regulations attempt to prevent the sale of tobacco products to minors through the use of enticing, aggressive advertising placed near schools that constitutes unfair or deceptive marketing practice under Massachusetts' consumer protection law. The Attorney General's regulation is in support of a government interest in commercial speech and should be examined using intermediate scrutiny, as set forth in *Central Hudson*, which directs courts to uphold regulations that directly and materially advance the government's substantial interest in preserving a fair bargaining process. In this case, that involves preventing minors from becoming involved in illegal commercial transactions for purchasing cigars. The regulations reasonably only seek limitations where children are most likely to be affected -- in the schoolyards, playgrounds, and stores that they frequent.

Should the Court decide to revise the *Central Hudson* test, the regulations at issue also would pass muster using the extremely stringent commercial speech test that would only permit regulation of commercial speech if the underlying commercial transaction has been prohibited. In Massachusetts it is illegal to sell tobacco products to a minor. The Attorney General's regulations are narrowly-tailored only to limit commercial speech where children are most likely to frequently see it. Where the act is prohibited, government regulation of commercial speech promoting the act should be reviewed at no more than an intermediate level of scrutiny.

ARGUMENT

Massachusetts Regulations Title 940, Sections 22.06(5)(a)&(b) and 22.06(2)(c)&(d) directly target sales and distribution of cigars to children made illegal by Massachusetts General Law Chapter 270, Section 6 without prohibiting lawful communication to adults. The current data on cigar marketing and sales practices warrants the restrictions featured in these consumer protection regulations.

I. CHILDREN UNDER THE AGE OF 18 YEARS ARE EXPOSED TO A HIGH LEVEL OF ILLEGAL DISTRIBUTION OF CIGARS

Despite the Commonwealth's efforts and successes to enforce its law setting a minimum age for cigar sales, Mass. Gen. Laws chapter 270, §6; *see also* discussion, *infra*, part II.B, high rates of underage cigar use show that the illegal retail distribution of cigars remains alarmingly high. High youth cigar smoking rates were first reported in 1996, when 14.5% of high school students in Massachusetts reported having smoked a cigar during the previous month. CDC, *Cigar Smoking Among Teenagers -- United States, Massachusetts, and New York, 1996*, 46(20) Morbidity and Mortality Weekly Report ("MMWR") 433, 432 (May 23, 1997) *republished at* <http://www.cdc.gov/tobacco/research_data/mmwr4620.htm#first> (visited on March 21, 2001). In 1998, a study revealed that monthly cigar use among the same age group reached 22%. CDC, *Tobacco Use Among High School Students -- United States, 1997*, 47(12) MMWR 229, (April 3, 1998) *republished at* <http://www.cdc.gov/mmwr/PDF/wk/mm4712.pdf> (visited on March 21, 2001). In October of 2000, the CDC reported that 15.4% of middle school students and 41.6% of high school students tried cigar smoking, and that 6.1% of middle school students and 15.3% of high schools students regularly smoke cigars, making cigars the second most popular tobacco product after cigarettes. CDC, *Youth Surveillance United States 1998-1999*, 49 MMWR (Oct. 13, 2000) at 5. *republished at* <http://www.cdc.gov/tobacco/research_data/youth/ss4910.pdf> (visited on March 21, 2001) [hereinafter CDC 2000 Youth Report].

In its initial version of its "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect

Children and Adolescents," the FDA included "little cigars." 61 Fed. Reg. 44396 (1996). While confusion with federal tax laws and a lack of empirical evidence ultimately dissuaded the FDA from including "little cigars" in its final version of the regulations, *see id.* at 44424, the current evidence, all of which has surfaced since the FDA decided to exclude little cigars, now justifies including cigars in the Commonwealth's regulations targeting illegal distribution of cigars to children.

II. MASSACHUSETTS REGULATIONS TITLE 940, SECTIONS 22.06(5)(a)&(b) AND 22.06(2)(c)&(d) TARGET THE DISTRIBUTION OF CIGARS TO CHILDREN MADE ILLEGAL BY MASSACHSUETTS GENERAL LAW CHAPTER 270, SECTION 6

After a statewide study revealed that retailers display tobacco advertisements at one-and-one-half times greater frequency near elementary and middle schools than elsewhere, evincing a marketing scheme designed to entice minors to obtain cigarettes in violation of the minimum age law, *Massachusetts Operation Storefront 1998,* Mass Dept. of Public Health (1998) *republished at* <http://www.state.ma.us/dph/mtcp/report/osrep.htm> (visited on March 21, 2001) [hereinafter Operation Storefront], the Massachusetts Attorney General sought a remedy to protect children from the illegal sales and distribution of tobacco products. The solution came in the form of regulations expressly designed to "prevent access to [tobacco products] by underage consumers," Mass. Regs. Code tit. 940, chs. 21.00; 22.00, and largely modeled on the now defunct FDA tobacco-related regulations. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The regulatory provisions challenged by the cigar petitioners feature three requirements: 1) outdoor cigar advertisements must be at least 1,000 feet away from elementary schools and certain other areas frequented by children, *see* Mass. Regs. Code tit. 940, § 22.06(5)(a); 2) indoor cigar advertisements within these areas may not extend below five feet from the floor of any part of a retail establishment open to the general public, *see id.* at § 22.06(5)(b); and 3) retailers may not allow unchecked access to cigars, s*ee id.* at § 22.06(2)(c) & (d).

A. Many General-Use Retail Stores in Massachusetts Display Cigar Advertisements, Warranting State Consumer Protection to Target the Encouragement of Illegal Retail Distribution of Cigars to Children

Massachusetts Regulation Title 940, Sections 22.06(5)(a)&(b) target illegal sales and distribution of cigars to children by limiting the ability of cigar companies to lure children to attempt to obtain cigars. While the link between recent increases in cigar use and advertising is widely suspected in the public protection community, *see* Frank Baker PhD, et al., *Health Risks Associated with Cigar Smoking*, 6 JAMA 655, 735 (Aug. 9 2000), a brief examination of cigar marketing clarifies the acute need recognized by the Massachusetts Attorney General to include cigars in his regulations designed to increase compliance with Massachusetts General Law Chapter 270, Section 6.

The resurgence of cigars began with the practice of manipulating news and entertainment media. Internal documents unearthed by the Baltimore Sun Newspaper show that this industry-level scheme was hatched in the early 1980s with the formation of a trade association called the Cigar Association of America Inc. *See* Alec Klein, *The Cigar Caper*, The Baltimore Sun, Jan. 11, 1998, at 1A. The Association decided that "the consumer of the '80s may harbor built-in skepticism when he reads an advertisement in a magazine or sees a commercial on TV[, but] he accepts and believes the public relations message [of the cigar industry] because it reaches him in the form of news and information." *Id.*

This manipulation of entertainment media has continued into the 1990s. Most recently, it was revealed that members of the cigar industry used product placement firms to insert their products into large budget films such as the First Wives Club, Golden Eye, She's the One, and most notably the film Independence Day, which reached more than 60 million people. *See* Alec Klein, *The Cigar Caper,* The Baltimore Sun, Jan. 12, 1998, at 1A. Members of the cigar industry similarly inserted their products into primetime television shows on national networks, such as Third Rock From the Sun, Cosby, Mad About You, Suddenly Susan, and Murphy Brown. *See id.*

The promotion of cigars, however, has now matured to include advertising in general-use retail stores, bringing it within the marketing techniques that the Massachusetts Attorney General concluded would increase the illegal distribution of tobacco products to children. A 1999 study that examined the presence of outdoor and indoor cigar advertising in Worcester, Massachusetts revealed that 11% of tobacco advertising at general-use retail stores is devoted to cigars. Joseph R. DiFranza, et al. *A Comparison of the Advertising of Accessibility of Cigars, Cigarettes, Chewing Tobacco, and Loose Tobacco*, 29 Preventive Medicine 321, 323 (1999) [hereinafter DiFranza]. The study's authors compared their findings to those of a similar study conducted in 1987, and stated "that there may have been a substantial increase in point-of-purchase advertising for cigars" at general-use retail stores. *Id.*

The Worcester study's findings are explained by the increase in the amount of money that cigar companies give to retailers. Traditionally, tobacco manufacturers compete for advertising space in retail stores with generous promotional allowances. *See id.* at 324. In its 1999 Cigar Report to Congress, the FTC concluded that the cigar industry has recently increased spending on such promotional allowances to comprise 40% of the industry's product promotion budget in 1997. FTC, *Report to Congress: Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997*, at 4 (1999) *republished at* <http://www.ftc.gov/os/1999/9907/cigarreport1999.htr> (visited on May 8, 2000); *see also* 1999 WL 514267 [hereinafter FTC 1999 Cigar Report]. Combined with the amount spent on the actual point-of-sale advertisements, the cigar industry sent approximately 52.7% of its product promotion budget to retailers during the FTC's investigation. *Id.* The obvious control exerted through promotional allowances shows that the leading cigar companies are responsible for the increase in cigar advertising in general-use retail stores in Massachusetts.

The leading cigar companies have chosen to control retailers in a manner similar to the method used by cigarette manufacturers. Both industries devoted around 40% of their product promotion budgets to "promotional allowances" during the FTC's recent investigations. *See* FTC, 2001 Report to Congress: Cigarette Report For 1999, at 16 (2001) *republished at* <http://www.ftc.gov/reports/cigarettes/1999

cigarettereport.pdf> (visited on March 19, 2001) [hereinafter 2001 FTC Cigarette Report]. The cigar companies have spent more aggressively on point-of-sale advertisements, devoting 12.7% of their advertising budget on this category as opposed to the cigarette industry's 5.4% in 1997. *Compare id &* FTC 1999 Cigar Report at 4. While the several-billion dollars that the cigarette industry spends on product promotion by retailers dwarfs that spent by the cigar industry, both industries aggressively encourage advertising of their products by retailers. *See id.*

Because the cigar and cigarette industries similarly encourage retailers to advertise their products, consistent regulation is prudent. The Massachusetts Regulation Sections 22.06(5)(a)&(b) would reduce the illegal distribution of cigars to children by preventing cigar companies from luring children to obtain cigars on their way to and from school and in general-use retail stores where they shop.

B. Massachusetts Regulation Title 940, Sections 22.06(5)(a)&(b) Are Integral to the Massachusetts Tobacco Control Program's Overall Effort to Reduce Illegal Distribution of Cigars to Children

In its 2000 analysis of proposed consent orders to end certain deceptive practices carried on by leading cigar companies,[2] the FTC explicitly recognized the acute need of state consumer protection regulation for cigar advertising, stating:

> [T]he Commission recognizes *the critically important role that states play in consumer protection and tobacco control.* The [health warning] provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by

[2] *See In the Matters of* Swisher International, Inc. (Matter No. 002-3199); Consolidated Cigar Corporation (Matter No. 002-3200); Havatampa, Inc. (Matter No. 002-3204); General Cigar Holdings, Inc. (Matter No. 002-3202); John Middleton, Inc. (Matter No. 002-32-05); Lane Limited (Matter No. 002-3203); and Swedish Match North America, Inc. (Matter No. 002-3201) *respectively at* 1 (June 2000). *See* <http://wwwftc.gov.os/2000/06/index> (visited at March 21, 2001).

> the proposed orders (such as shelf talkers under a certain size), or *state or local restrictions on the advertising placement or youth access to tobacco products are not affected.*

65 Fed. Reg. 41998, 42000 (2000) (emphasis added). The "critically important role" for state consumer protection regarding advertising placement includes reducing the illegal sale and distribution of cigars to children.

Indeed, the Surgeon General of the United States concurs that states should restrict advertising placement to reduce illegal distribution of all tobacco products to children. *See* David Satcher, MD, PhD, *Reducing Tobacco Use: A Report of the Surgeon General*, Dept. of Health and Human Services, at 375 (2000) [hereinafter 2000 Surgeon General Report]. The Surgeon General recognizes four essential components of a state program that has a goal of "preventing initiation [(and by extension distribution of tobacco products)] among young people." *Id.* In his list, the Surgeon General includes "reducing protobacco messages." The Surgeon General warned that "a major econometric marketing study found that young people are three times more affected by [tobacco] advertising than are adults," and that "34% of all youth experimentation with smoking in California between 1993 and 1996 can be attributed to tobacco promotional activities." *Id.* at 410.

Massachusetts' tobacco control program already has three of the Surgeon General's four components in place for cigars and other tobacco product. The first component, "decreasing young people's access to tobacco products," *id* at 410, is substantially achieved through municipal level licensing regulations, ordinances and by-laws, although current rates of cigar use suggest more regulatory protection is needed, *see* discussion, *infra*, part II. The Commonwealth's tobacco control program has successfully facilitated licensing of tobacco retailers in approximately 230 of the 351 municipalities in Massachusetts as of July 2000. *See* Massachusetts Municipal Association Tobacco Regulation Maps *republished at* <http://www.mahb.org/tobacco/massmaps/tobpermit.htm> (visited on March 21, 2001). The licensing schemes in these municipalities commonly require retailers that sell tobacco to educate their employees about state and local tobacco control laws and to consent to unannounced compliance checks. *See, gen.*,

Massachusetts Association of Boards of Health Model Youth Access Regulations, *republished at* <http://www.mahb.org/bohregs/bohregsframe.htm> (visited on March 21, 2001). The permitting schemes also institute a fine structure that often establishes civil penalties ranging in the hundreds of dollars for the recurrent failure to check a minor's age before selling her a tobacco product. *Id.* Suspension of permits to sell tobacco is used in extreme cases. *Id.* Through the establishment of permitting regulations and controlled buying attempts by youth under the age of 18 -- 31,603 attempts as of 1998 -- the Commonwealth has significantly reduced youth access to all tobacco products. *See* William L Hamilton & Giulia diStefano Norton, *Independent Evaluation of the Massachusetts Tobacco Control Program,* Abt Associates, Inc., 49-50 (1999) [hereinafter Hamilton Report].

The second component, "increasing prohealth messages," 2000 Surgeon General Report, *supra*, at 374, has been undertaken in the form of massive youth education campaigns to reduce underage use of all tobacco products. Hamilton Report, *supra*, at 42. In fiscal year 1998, Massachusetts schools received $21 million for tobacco education. *Id.* at 45. Additionally, in 1998, the Department of Public Health sponsored or participated in almost 900 events outside of schools drawing about 160,000 attendees, *id.* at 45, and purchased $11.21 million in mass media counter-advertising, *id.* at 7.

The United States Surgeon General's third component of a comprehensive state regulatory scheme to reduce underage tobacco use is "increasing the price of tobacco products." 2000 Surgeon General Report, *supra*, at 374. Massachusetts increases the price of cigars by charging an excise tax. Mass. Gen. Laws. ch. 64C, § 7B.

Massachusetts Regulation Title 940, Sections 22.06(5)(a)&(b) fulfills the Surgeon General's fourth component of "reducing the protobacco message" without prohibiting information about tobacco products to adults. *See* 2000 Surgeon General Report, *supra*, at 374. In concert, the Surgeon General's components of a comprehensive plan to prevent tobacco use by children would serve to reduce the illegal distribution of cigars to children. An incomplete application of the Surgeon General's comprehensive plan would allow an unacceptable level of noncompliance with the Commonwealth's minimum age tobacco sales law.

C. Many General-Use Retail Stores in Massachusetts Allow Unchecked Access to Cigars, Warranting the Limited Restriction on Self-Service to Cigars Pursuant to Massachusetts Regulation Title 940, Sections 22.06(2)(c)&(d)

In his 2000 Report on tobacco use, the United States Surgeon General recognized that controlling access to tobacco products is integral to reducing distribution of tobacco to youth. 2000 Surgeon General's Report, *supra*, at 207-23. Self-service to tobacco products in general-use retail stores has been associated with greater access (albeit by shoplifting) to cigarettes, especially among children. Marianne B. Wildey, et al., *Self-Service Sale of Tobacco: How It Contributes to Youth Access*, 4 Tobacco Control: An Int'l Journal, 327, 355 (Winter 1995) [hereinafter Wildey]. Massachusetts Regulation Title 940, Sections 22.06(2)(c)&(d) would reduce this form of youth access to cigars by simply requiring retailers to verify their customers' age before they are allowed to physically handle cigars or packages of cigars.

At first glance, unchecked access to any tobacco product seems self-defeating for retailers, given that they report a strong correlation between self-service to cigarettes and revenue loss due to shoplifting of cigarettes. Wildey, *supra*. A New York study completed in the early 1990s found that 44% of 14 to 15 year-old children admitted to stealing cigarettes. *id.* In 1999, the CDC found that nationally 11.4% of middle school age children regularly obtained cigarettes by theft. CDC 2000 Youth Report, *supra*, at 21.

The promotional allowances distributed to cigarette retailers, however, compensates a retailer for his loss. *See* Wildey, *supra*, at 359-60. Under this technique, a retailer of cigarettes makes money facilitating elevated levels of cigarette theft by allowing unchecked access to tobacco products up to the moment of payment. *See id.* In 1994, retailers lost an average of $1,200 annually from theft of cigarettes, and at the same time received about a $1,500 promotional allowance from cigarette manufactures. *Id.* From 1994 to 1998, cigarette manufacturers have since increased their promotional allowance budget by several-billion dollars to comprise over 42% of its product promotion budget, which indicates that providing unchecked access to cigarettes prior to payment is even more profitable now. *See* 2001 FTC Cigarette Report, *supra*, at 14-16.

The FTC's 1999 Cigar Report indicates that similar arrangements exist between the leading cigar companies and retailers that sell cigars. The FTC's Report shows that the cigar industry devoted 40% of its promotional expenditures to promotional allowances for cigar retailers. *See* FTC 1999 Cigar Report, *supra*, at 4. Such expenditures explain recent findings, which show that 16.8% of the general-use retail stores in Massachusetts displayed cigars and cigar packages in a manner that allowed any person to take the product without assistance from a store clerk. DiFranza, *supra*, at 324 (also noting that this percentage excludes vending machines or establishments exclusively devoted to cigar sales).

As with cigarettes, the promotional allowances given by the leading cigar companies that increase the unchecked retail access to cigars also probably facilitate youth access. In 1999, 12.8% of middle school age youth and 4.8% of high school age youth regularly obtained cigars by theft. CDC 2000 Youth Report, *supra*, at 23. These factors are undoubtedly well known to cigar companies.

The restriction on self-access to cigars under Massachusetts Regulation Sections 22.06(2)(c)&(d) should not be the subject of a First Amendment analysis. This regulation preserves a retailer's ability to display cigars and cigar packaging to the public. Under the restriction, retailers could legally display products behind glass or clear plastic, display products behind the clerk's counter, display products in a locked humidor, display products in a closed kiosk anywhere in a store, and countless other methods of display. Additionally, under the regulations, cigars may be displayed in a manner that allows patrons to hold, smell, and otherwise inspect any tobacco product without assistance from store personnel if entrance to the facility is restricted to adults. *See* Chapter 22.06(4)(c). Such an adult-only facility arguably could comprise an enclosed area or part of any "retail outlet" that is open to the general public described in Sections 22.02(2)(c)&(d).

III. THE ATTORNEY GENERAL'S REGULATIONS ARE CONSISTENT WITH FIRST AMENDMENT VALUES UNDER A STRICTER COMMERCIAL SPEECH TEST AS SUGGESTED IN *44 LIQUORMART* BECAUSE A PARTIAL SPEECH REGULATION BASED ON A COMMERCIAL GOVERNMENT INTEREST SURVIVES WITH OR WITHOUT *CENTRAL HUDSON*

The Attorney General's regulations survive a more rigorous examination under new approaches to judicial scrutiny of commercial speech regulations. In the event that the Court applies a standard limiting commercial speech regulations to partial restrictions in furtherance of the government's interest in commercial protection of its citizens, the regulations at issue would be constitutional.

The Supreme Court has indicated that it may reexamine the current commercial speech analysis used to determine if a government regulation of commercial speech is constitutionally sound. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Under the current *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* test, commercial speech receives an intermediate level of scrutiny. 447 U.S. 328 (1980). In *44 Liquormart*, by contrast, the Justices employed several approaches to determine that Rhode Island had abridged the liquor retailers' free speech. Justice Stevens' plurality opinion set out a modified *Central Hudson* approach where an intermediate level of scrutiny would still be employed to examine speech restrictions intended "to protect consumers from misleading, deceptive or aggressive sales practices." *44 Liquormart*, 517 U.S. at 501. A strict level of scrutiny would be employed if the government "entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." *Id.* at 499. Justice Thomas stated that an absolute prohibition should be *per se* unconstitutional because it is paternalistic, *Id.* at 519 (Thomas, J. concurring in part) while Justice O'Connor saw no need to reexamine the *Central Hudson* test because the Rhode Island statute did not even pass that test. *Id.* at 528 (O'Connor, J. concurring). In addition, Justice Thomas proposed abandoning *Central Hudson* and

returning to an analysis set out in an earlier commercial speech case, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S.748 (1976), that preventing *legal* choices by citizens by keeping them ignorant is unacceptable. *Id.* at 526 (Thomas, J. concurring).

A. The Regulation is Not an Absolute Prohibition and Therefore Should Receive an Intermediate Level of Judicial Scrutiny

The regulation at issue is not a prohibition because it allows the dissemination of truthful, non-misleading information about the product. The government cannot restrict an activity it does not approve of by banning the speech related to or advertising that activity. *See 44 Liquormart*, 517 U.S. at 501; *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); *Central Hudson*, 447 U.S. at 566. In *44 Liquormart*, the government placed total bans on speech to limit adults' access to information for a lawful product in a fashion that made it practically impossible for adults to receive the information anywhere within the state's boundaries. *44 Liquormart*, 517 U.S. at 504. Here, by contrast, the Attorney General has limited the regulation to a geographic area where children are most likely to be present. Mass. Regs. Code tit. 940, § 22.06(5). Additionally, there are many alternative sources for adults to gain access to this information including newspapers, magazines, and inside the stores themselves and therefore the Court of Appeals correctly found "the restrictions are not equivalent to a blanket ban on speech." *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 52-3 (1st Cir. 2000).

The industry can continue to advertise in all the same media as before except for storefronts near schools and playgrounds. *Id.* at 52 (interpreting Mass. Code Regs. tit. 940, § 22.06(5). In stores within the zone of the regulation, cigars may still be advertised within the store above 5 feet from the ground to lessen the likelihood of children being influenced by them. Mass. Code Regs. § 22.06(5)(b). For this reason, the Court's concerns regarding a prohibition on speech directed at adults are not implicated by a lesser restriction. *See 44 Liquormart*, 517 U.S. at 501 (plurality), 519-20 (Thomas, J. concurring). As the regulation leaves open many alternative geographic and media channels of communication, it is not a

complete prohibition on speech and should be analyzed under an intermediate level of scrutiny.

B. The Regulation Furthers a Substantial Government Interest in Commercial Matters and Therefore is Subject to an Intermediate Level of Judicial Scrutiny

The Commonwealth's regulations would pass constitutional muster under the plurality's analysis in *44 Liquormart,* stating that limitations on speech that are aimed at achieving a commercial government purpose receive intermediate scrutiny. The case law striking down statutes, restricting commercial speech consistently identifies as a flaw in the statutes that the government interest did not relate to consumer protection, within a commercial speech context. *See 44 Liquormart*, 517 U.S. at 491 (government interest was to promote temperance); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (government interest was to limit access to contraceptive counseling services).

The goal of the instant regulation is related to "the preservation of a fair bargaining process," and thus implicates commercial speech concerns. *See 44 Liquormart*, 517 U.S. at 501; Mass. Code Regs. tit. 940, § 22.06(5)(a). Targeting minors with advertisements meant to entice them to purchase products that are illegal to sell to minors is *per se* "unfair or deceptive acts or practices" and hence prohibited under Massachusetts law. Mass. Regs. Code tit. 940, §§ 21.04(5); 22.06(5); *cf. Mangini v. R. J. Reynolds Tobacco Co.*, 20 Cal. Rptr. 2d 232 (Cal. App. 1st 1993), *aff'd* 875 P.2d 73 (Cal. 1994) (noting that California law holds that it is *per se* unfair to entice minors to purchase tobacco products where it would involve a minor in an illegal transaction).

Under Justice Stevens' approach in *44 Liquormart*, an intermediate scrutiny analysis is still valid where there is a government interest in commercial matters and should still be employed to prevent aggressive sales practices, such as marketing a dangerous addictive drug to minors, particularly where state law prohibits sales to minors. 517 U.S. at 501. The Court has upheld speech restrictions limiting the aggressive sales practices of in-person attorney solicitations, *see Florida Bar v. Went-For-It, Inc.*, 115 S. Ct. 2371 (1995), and direct mail by attorneys targeting injured

parties or their survivors, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). The Attorney General is seeking to regulate the more aggressive sales practice of purposefully luring minors into using an addictive product with expensive, well-researched advertising campaigns. This aggressive sales practice is evidenced by the higher concentration of tobacco advertising on retail store windows the closer one draws to a school. *See* Operation Storefront, *supra.* "Storefronts located within 1000 feet of a school were significantly more likely to display tobacco advertisements, and displayed more tobacco advertisements per vendor than did vendors farther away from schools." *Id.* at 11. The increased number of tobacco advertisements near schools "expos[ed] children to nearly one and a half times more tobacco displays during their daily activities." *Id.* The repeated observation of this phenomenon belies any claim that it is a coincidence.

Unfair competition is also a substantial state interest for regulating tobacco advertising without violating the First Amendment. State and federal laws currently regulating unfair competition often affect the advertising of otherwise legal products. *See, e.g.,* Federal Trade Commission Act of 1914, Pub. L. No. 106-170, 38 stat. 717 (codified as amended at 15 U.S.C. § 45); *see also* Mass. Gen. Laws ch. 93A, § 2(a). Yet these laws do not violate the First Amendment because the government has a substantial interest in preventing overreaching in the marketing of consumer products. Furthermore the government interest at stake is the interest in the fair transaction of commerce. Where the government seeks to regulate commercial speech in the marketplace the court applies an intermediate level of scrutiny where the government is regulating commercial concerns not political ones. *See 44 Liquormart*, 517 U.S. at 501.

The United States Supreme Court contemplates that speech may be lawful and nonmisleading, yet still may implicate substantial economic concern on the part of the state. *See Edenfield v. Fane*, 507 U.S. 761 (1993) (speech-restrictive statutes analyzed under third and fourth prongs of *Central Hudson* test even though speech was acknowledged to be truthful and nonmisleading). Representations by manufacturers of the health benefits of a consumer product are properly considered as part of the decision-making process of a consumer. Mass. Gen. Laws ch.93A, § 2(a). In the instant case, speech that may be nonmisleading for adults entices children to be

involved in breaking the law when purchasing tobacco products. *Consolidated Cigar*, 218 F.3d at 42-43.

The FTC found that the cigar industry has indeed engaged in deceptive and unfair practices and recently entered into consent decrees with seven cigar manufacturers requiring warning labels on cigar advertising and packages. *See In the Matter of Swisher Intntl, Inc.*, FTC File No. 002-3199 *republished at* <http//www.ftc.gov/os/2000/06/swisherconsent.htm> (visited on March 21, 2001). Also, the FTC found a "large spending increase in point of sale advertising" for cigars from 1996 to 1997. *See* FTC 1999 Cigar Report, *supra*, at 3. The FTC helped rebalance the bargaining positions of the tobacco industry and consumers by regulating advertising. The Attorney General's regulations do not violate the First Amendment because they are aimed at speech that is an unfair advertising practice in the context of communication to minors.

The regulations also meet the standard suggested by Justice Thomas in *44 Liquormart*, who stated that he would welcome a result that would not permit a state to "restrict advertising regarding commercial transactions except to the extent that it outlaws or otherwise directly restricts the same transactions within its own borders." *44 Liquormart*, 517 U.S. at 525 (Thomas, J. concurring); *see also United States v. Edge Broadcasting*, 509 U.S. 418, 433-34 (statute upheld where it regulated speech about an illegal activity). This is precisely the approach taken here. The Commonwealth has prohibited the sale of cigars to minors and the regulations at issue regulate tobacco advertising where minors are most likely to see the ads. Mass. Regs. Code tit. 940, §§ 21.04; 22.03; 22.06. The Attorney General's regulations only "restrict advertising regarding commercial transactions" as far as the state's prohibition extends. *44 Liquormart*, 517 U.S. at 525 (Thomas, J. concurring). Under this analysis, the Attorney General's regulations would withstand review because of their limited geographic scope related to where minors actually congregate. By contrast, the statute in *44 Liquormart* would still fall because the statute there completely banned speech to deprive adults of information throughout the jurisdiction. The Attorney General's regulations are consistent with First Amendment commercial speech values even under the stricter approaches suggested by *44 Liquormart*.

IV. THE REGULATION DIRECTLY AND MATERIALLY ADVANCES THE GOVERNMENT INTEREST AND IS NO MORE EXTENSIVE THAN NECESSARY TO PREVENT CHILDREN FROM BEING EXPOSED TO UNFAIR ADVERTISING PRACTICES

As the regulation is not a prohibition on commercial speech and it does relate to government interest in commercial transactions, it does not meet the criteria set out in *44 Liquormart* for heightened scrutiny. Therefore, the appropriate standard to apply is the *Central Hudson* test.

Commercial speech regulations must conform to the four-part commercial speech test set forth in *Central Hudson*, 447 U.S. 328. Constitutionally protected commercial speech may be regulated if the government furthers a substantial interest through a regulation that directly and materially advances that interest in a way that is no more extensive than necessary to achieve that interest. *Id.* at 566. Although the Attorney General, in regard to the first prong of the test, has not "concede[d] that the targeted advertising qualifies for protection, since it might be seen to induce illegal activity," *Lorillard Tobacco, Co. v. Reilly*, 84 F. Supp. 2d 180, 185-86 (D. Mass. 2000), he has done so for the purposes of summary judgment. *Consolidated Cigar*, 218 F.3d at 43.

The second prong, requiring that the regulation further a substantial state interest, is not at issue in this case as Petitioner cigar companies concede that preventing youth from acquiring tobacco products is a substantial state interest. *See* Br. Pet'r Altadis U.S.A., et al. at 8. The third and fourth prong of the *Central Hudson* test regarding whether the regulation directly and materially advances the government interest in protecting minors in a manner that is no more extensive than necessary are at issue in this case. *Consolidated Cigar*, 218 F.3d at 43.

A. The Government's Substantial Interest in Protecting Minors Under Consumer Protection Laws is Directly and Materially Advanced By the Regulation

The government regulation must directly and materially advance the government's interest. *44 Liquormart*, 517 U.S. at 505 (plurality). Social science research shows that minors are particularly susceptible to tobacco advertising and limiting the youth appeal of the advertising should directly affect the enticement of children to acquire tobacco through purchase or theft.

There is extensive social science research regarding the effect of tobacco advertising on the purchasing habits of teen smokers and on the positive imagery with which children regard and recognize tobacco advertising images. Researchers have demonstrated a strong link between tobacco promotion and the decision by adolescents to begin to smoke. J. Pierce, et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998). After the introduction of the Joe Camel ad campaign in the late 1980s, the market share of Camel cigarettes in the teen market increased at least 20-fold, and the previous decline in teenage smoking was reversed. CDC, *Changes in the Cigarette Brand Preferences of Adolescent Smokers - United States, 1989-1993*, 43(32) MMWR 577-81 (1994). The rise in young girls' smoking habits after the tobacco industry decided to go after girls as a target market has also been documented. J. Pierce, et al., *Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising*, 271 JAMA 608 (1994).

The Attorney General regulated cigar advertising as part of "a rational and well-founded comprehensive tobacco regulatory scheme" to prevent minors from being enticed to use tobacco products. *Consolidated Cigar*, 218 F.3d at 49. Every state has laws that prevent or discourage sales of tobacco products to minors. National Cancer Institute. *State and Local Legislative Action to Reduce Tobacco Use*. Smoking and Tobacco Control Monograph No. 11, U.S. Dept of Health and Human Services, Nat'l Inst. of Health, (August 2000). Yet, in Massachusetts, storefront advertising by the tobacco industry increases the closer a storefront is to a school. *See* Operation Storefront, *supra,* at 11. Cigar advertising makes up 11% of tobacco advertising at retail establishments. *See*

DiFranza, *supra*, at 323. Cigars are an important component of an overall tobacco product regulatory approach to prevent minors from purchasing or stealing tobacco products. Regulating cigarette advertising without regulating cigar advertising would allow the cigar industry to fill the cigarette advertising slots and to achieve the perverse result of driving minors from cigarettes to cigar use. *See id.* at 321.

This "filling the advertising gap" behavior by the cigar industry was documented and regulated by Congress in the Little Cigar Act of 1973. Little Cigar Act of 1973, Pub. L. No. 93-109, 87 Stat. 352 (1973) (codified as amended in scattered sections of 15 U.S.C.). Congress had passed the Federal Cigarette Labeling and Advertising Act stating that cigarettes could not be advertised over any electronic medium beginning on January 1, 1971. *See* FTC 1999 Cigar Report, *supra*, at 11-12. In the wake of this law, the cigar industry increased television advertising to such an extent that there was a 254% jump in consumption of little cigars from 1971 to 1972. *See id.* Congress subsequently regulated advertising of Little Cigars over electronic media. *See* Little Cigar Act of 1973 (codified at 15 U.S.C. § 1335). The Attorney General's comprehensive program to prevent targeting of youth reasonably restricts cigar advertising on storefronts for similar reasons, as Congress chose to regulate Little Cigars on television and radio.

The Court has applied a commonsense approach, recognizing that the purpose of advertising is to increase consumption of a product and that limited restrictions on advertising would have a concomitant effect on purchases of the product. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). In contrast, the Court places a heavier burden on the government to show that an *outright prohibition* on speech is justified by a direct and material effect in achieving the government's interest. *44 Liquormart*, 517 U.S. at 501.

In the current case, the regulation is not a prohibition. The cigar company Petitioners may still advertise in newspapers and magazines and at the point of purchase within a store as long as the advertising is at least five feet above the ground and not visible from outside the store. Mass. Regs. Code tit. 940, § 22.06. The Court's concern regarding paternalistic total bans on speech, as in *44 Liquormart*, is not implicated here because of the more limited scope

of the regulation. *See 44* Liquormart, 517 U.S. at 501. By contrast, in *Florida Bar*, the Court upheld "a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers." *44 Liquormart*, 517 U.S. at 502 (plurality) (interpreting *Florida Bar*, 515 U.S. at 633-34). Therefore the proper test to apply is the one set forth in *Florida Bar* which allows a commonsense recognition that advertising tends to have an effect on consumer behavior. *Florida Bar*, 515 U.S. at 626. This commonsense approach would include recognition that youth are particularly vulnerable to being swayed by advertising. Petitioners would not pay huge fees to advertising companies to create media imagery if such imagery did not produce the desired results. *See Dunagin v. Oxford*, 718 F.2d 738, 749-50 (5th Cir. 1983).

The social science evidence is strong that tobacco industry advertising increases the likelihood of youth purchase and use of tobacco products. Additionally, a commonsense understanding of marketing techniques supports the conclusion that consumers, and particularly minors, are influenced to make commercial decisions based on advertising. The Attorney General's regulations directly and materially advance the government interest in preventing minors from being taken advantage of in commercial matters under a commonsense approach or the stricter tests for outright prohibitions.

B. The Regulation is Targeted to Areas Where Children Congregate and Therefore is No More Extensive Than Necessary To Achieve the Government Purpose of Protecting Children From Manipulative Advertising Schemes

The fourth prong of *Central Hudson* requires that the regulation be no more "extensive than necessary" to achieve its goal. *Central Hudson*, 447 U.S. at 566. Thus a government regulation of commercial speech need not be the least restrictive means available, but rather must achieve a reasonable fit between the government's goals and its means. *See 44 Liquormart*, 517 U.S. at 529 (O'Connor, J. concurring in the judgment). The State's regulation must indicate "a careful calculation of the costs and benefits associated with the burden imposed by its prohibition." *Id.* (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). The

government need not present a solution that solves all problems at once and does not need to "make progress on every front before it can make progress on any front." *United States v. Edge Broadcasting, Co.*, 509 U.S. 418 (1993).

The only other Circuit to address this specific issue, the Fourth Circuit, also found that reasonable, partial limitations on outdoor tobacco advertising designed to protect children and not limit adult speech was within the bounds of the First Amendment. *Penn Advertising of Baltimore y. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated* 518 U.S. 1030 (1996), *modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied.* 520 U.S. 1204 (1997). The Fourth Circuit Court of Appeals specifically held that a Baltimore ordinance was no more extensive than necessary because it only addressed areas where the advertising was more likely to be seen by minors. *See Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995) (companion case to *Penn Advertising* addressing Baltimore's regulation of billboard liquor advertisements).

The Court disfavors complete bans on speech that are aimed at adults for paternalistic reasons. *44 Liquormart*, 517 U.S. at 501. In the current case the regulation is aimed at regulating speech targeting children to prevent the Petitioners from taking commercial advantage. The regulation is no more extensive than necessary because it is targeted where children are most likely to congregate. Indeed, children are required by truancy laws to be in school and thus within the proximity of the locations regulated by the Attorney General. *See* Mass. Gen. Laws ch. 76, § 1.

The narrowly-tailored element of commercial speech analysis does not require that government employ the least restrictive means available, but rather that the government's regulation be a reasonable fit between the goal and the method chosen to achieve the goal. *44 Liquormart*, 517 U.S. at 529 (O'Connor, J. concurring in the judgment). Justice O'Connor points out, however that "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First amendment scrutiny." *Id.*

Other alternatives proposed in *44 Liquormart* and Petitioner's brief, such as better education, higher taxes, and licensing retailers that sell tobacco products have been tried and are in place without

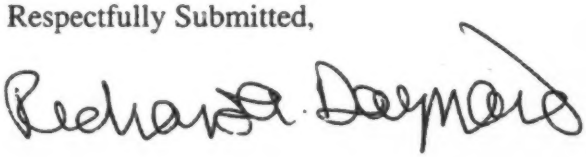
solving the problem. *See* discussion, *supra*, Part II. B. (discussing recommendations of The Surgeon General of the United States and Massachusetts programs in accord with those recommendations).

The Massachusetts Regulations Title 940, Chapter Sections 22.06(5)(a)&(b) and 22.06(2)(c)&(d), which directly and materially furthers the substantial state interest in protecting minors from commercial manipulation, is no more extensive than necessary by focusing on only areas where children congregate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully Submitted,



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Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae American Legacy Foundation ("Legacy") is an organization created in 1998 by the Master Settlement Agreement ("MSA") between tobacco manufacturers and attorneys general from 46 states and five territories, with a primary purpose of preventing underage tobacco use.[1] To this end, Legacy operates and funds a countermarketing campaign, sponsors public education, and conducts research on the effects of tobacco advertising on youth. Its board of directors is composed of two state attorneys general, two governors, two members of state legislatures, one youth, and four members who are experts in medicine, public health, and tobacco research.

Legacy believes that any successful program to eliminate underage tobacco use must include not only public education, but also stringent restrictions on advertising that bombards youth with positive messages about tobacco use. Tobacco advertising significantly increases youth smoking, and no amount of countermarketing, standing alone, can extinguish youth demand for tobacco products. Legacy therefore supports the restrictions imposed by Massachusetts because the tobacco ads at issue make youth a captive audience and present unfair and inherently deceptive messages to that audience about tobacco use.

STATEMENT

After decades of sustained public education about the adverse health effects of smoking, adolescents are the only age group that continues to take up smoking in significant numbers. Each day in the United States, 6,000 children under age 18 try their first cigarette, and over half of those be-

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[1] Pursuant to Rule 37.6, Legacy states that no counsel for a party authored any portion of this brief, and no person other than Legacy made any monetary contribution to its preparation or submission. Letters of consent to its filing have been lodged with the Clerk pursuant to Rule 37.3.

come daily smokers.[2] Nearly one in three American teenagers smokes. Tobacco use is the leading cause of preventable illness and death in the United States, with more than 400,000 Americans dying from smoking-related diseases each year. An estimated 25 million people, including five million of today's children, will die prematurely of smoking-related disease.[3] As this Court has recognized, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

In order to address this threat, states must implement comprehensive anti-smoking programs for young people. Health authorities and researchers agree that a critical component of any successful anti-tobacco program is advertising regulation, because tobacco ads are a significant contributing factor to underage smoking.[4]

1. The Health Risks of Underage Smoking

The age at which one begins smoking greatly influences the amount of smoking one will engage in as an adult and ultimately influences the smoker's risk of tobacco-related disease and death. Among adult smokers, those who started

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[2] *See* United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Incidence of Initiation of Cigarette Smoking — United States, 1965-1996*, 47 MORBIDITY & MORTALITY WKLY. REP. 837, 838 (1998).

[3] *See* United States Department of Health and Human Services, Centers for Disease Control & Prevention, *Reducing Tobacco Use: A Report of the Surgeon General — 2000* ("*Surgeon General 2000*"), Fact Sheet: A Call for Action (2000).

[4] *See Surgeon General 2000* at 6-7; Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,328-46 (proposed Aug. 11, 1995) ("FDA Proposed Tobacco Regulations"). Without addressing the validity of the FDA regulations under the First Amendment, this Court subsequently held in *Brown & Williamson* that the agency lacks statutory authority to regulate tobacco products.

smoking by early adolescence were more likely to be heavy smokers than those who began as adults. *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,317. Preventing youth smoking is obviously critical, because individual smoking patterns are established before adulthood: Nearly 90 percent of all adult smokers in the United States had their first cigarette by age 18.[5] The addictive properties of nicotine are most severe and enduring for those who begin smoking at the youngest ages.[6]

Cigarette smoking during childhood and adolescence produces significant health problems among young people, including an increased number and severity of respiratory illnesses, decreased physical fitness, an unfavorable lipid profile, and potential retardation in lung growth and lung function. *See Surgeon General 1994* at 15-29. All else being equal, the younger the age at which a person begins to smoke, the greater the risk of lung cancer and other smoking-related diseases. Lung-cancer mortality in males is highest among adults who begin smoking before the age of 15.[7] If an adolescent's tobacco use continues for a lifetime, there is a 50 percent chance that he or she will die prematurely as a direct result of smoking. *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,318. Smoking is responsible for approximately 30 percent of all cancer deaths (including 87

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[5] *See* United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, at 65 tbl.7 (1994) ("*Surgeon General 1994*").

[6] *See Surgeon General 1994* at 30-34; Richard J. Bonnie & Barbara S. Lynch, *Time to Up the Ante in the War on Smoking*, 11 ISSUES IN SCIENCE & TECH. 33, 35 (1994).

[7] *See* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1327 n.676 (1998); United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Reducing The Health Consequences of Smoking — 25 Years of Progress: A Report of the Surgeon General*, at 45 fig.3 (1989) ("*Surgeon General 1989*").

percent of lung cancer deaths), 82 percent of deaths from chronic obstructive pulmonary disease, 21 percent of deaths from coronary heart disease, and 18 percent of deaths from stroke.[8]

2. The Abundant Research Linking Tobacco-Industry Advertising to Increased Underage Smoking

Tobacco is one of the most relentlessly marketed consumer products. The tobacco industry spends a staggering amount of money — $8.24 billion, or about $22 million each day, in 1999 (an increase of more than 22 percent over the prior year's spending) — to advertise its products. *See* Federal Trade Comm'n, *Cigarette Report for 1999*, at tbl.3F (released 2001) ("*FTC Report 1999*").

a. The Industry's Practice of Targeting Underage Smokers

As the industry's own documents admitted in evidence in recent litigation make clear, tobacco manufacturers use advertising to target underage children and adolescents as "replacement smokers" for the 1.7 million customers lost each year to death and quitting. *See Surgeon General 2000* at 162.[9] The targeting of youth — dubbed the "starter" or "pre-smoker" market — has been a deliberate industry strategy based on research showing that children and adolescents

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[8] *See generally Surgeon General 1989* at 37-116. In addition, a causal relationship exists between tobacco use and cancers of the larynx, mouth, esophagus, and bladder; atherosclerotic peripheral vascular disease; cerebrovascular disease; and low birth weight babies. Cigarette smoking is also a probable cause of infertility and peptic ulcer disease and contributes to, or is associated with, cancers of the pancreas, kidney, cervix, and stomach. *See generally id.*

[9] In addition, tobacco companies have been shown to pay for the placement of both cigarettes and tobacco ads in areas of stores where children congregate, such as near candy displays. *See* California Dep't of Health Services, *California Tobacco Control Update* 7 & n.29 (Aug. 2000), *available at* www.dhs.cahwnet.gov / tobacco / documents / CTCUpdate.pdf. Likewise, the placement of tobacco ads below five feet — at kids' eye level — is another stratagem that attracts youth to tobacco products. *See id.*

are the most fertile demographic from which to cull the requisite 1.7 million new smokers annually.[10] An R.J. Reynolds strategic research report confirms that "[t]he renewal of the market stems almost entirely from 18-year-old smokers. No more than 5% of smokers start after age 24. . . ."[11] The simple arithmetic is that, without targeting youth, tobacco profits decline each year. Bennet Lebow, a prominent tobacco executive, articulated this inescapable economic reality: "If you really and truly are not going to sell to children, you are going to be out of business in 30 years." Mike Thomas, *Ad Sinks in as You See Body Bags*, ORLANDO SENTINEL, Oct. 5, 2000, at D1.

b. The Impact of Tobacco Advertising on Youth

Even when tobacco advertising is not intentionally aimed at children and adolescents, it is seen by youth and

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[10] *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,331. Numerous industry documents confirm that tobacco companies have targeted underage smokers. *See, e.g.*, Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, Final Rule, 61 Fed. Reg. 44,396, 44,481 n.129 (Aug. 28, 1996) ("FDA Final Rule"); R.J. Reynolds Draft Report of Apr. 15, 1976, Planning Assumptions and Forecast for the Period 1977-1986+ for R.J. Reynolds Tobacco Company at 14 ("Evidence is now available to indicate that the 14 to 18 year old group is an increasing segment of the smoking population. RJR-T *must soon* establish a successful *new* brand in this market if our position in the industry is to be maintained over the long term."), *available at* www.rjrtdocs.com/rjrtdocs/image_display.wm?PRODUCT=image&PAGE=1&DOC_RANGE=500232752+-2771&IMAGE_SIZE=890&SEARCH=0. The "Joe Camel" story is particularly revealing: That advertising campaign, which ran from 1988 to 1997, helped increase Camel's youth market share from three percent to more than 13 percent. *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,332.

[11] R.J. Reynolds Document of Feb. 29, 1984 at i, *available at* www.rjrtdocs.com / rjrtdocs/image_display.wm? PRODUCT=IMAGE&DOC_RANGE=501266969+-6976& SEARCH=3; *see also* 61 Fed. Reg. 44,481 n.129.

makes tobacco use attractive to them.[12] Tobacco manufacturers use sophisticated advertising strategies to communicate to the general public the symbolic social value of cigarettes. *See* POLLAY COMMENT at 2. They direct their money and marketing efforts so as to reach the consumers who are most likely to purchase their products, including youth.[13] As a retired Marlboro ad executive admitted: "'I don't know any way of [advertising tobacco] that doesn't tempt young people to smoke.'" Pollay et al. at 4 (citation omitted).

Ubiquitous Advertisements Foster "Friendly Familiarity." Tobacco advertising is everywhere: in stores, in newspapers and magazines, in motion pictures, in entertainment sponsorships, direct-mail promotions, coupons, and specialty items. Adolescents are inundated with tobacco advertising in various ways as they travel to and from schools and recreational areas and engage in other daily activities. The average 14-year-old has been exposed to more than $20 billion in tobacco advertising and promotions. *See Surgeon General 2000*, Executive Summary at 16. These massive advertising expenditures do not go unnoticed by youths: Studies have found that six-year olds can reliably recall tobacco advertising, and that primary school children can correctly identify tobacco brands in advertisements when brand identifications are deleted.[14]

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[12] *See* RICHARD W. POLLAY, COMMENT ON 940 CMR 19 AND 940 CMR 20, PROTECTING CHILDREN AS CONSUMERS: COMMENTS ON PROPOSED REGULATIONS RE: PACKAGING, MARKETING, DISTRIBUTION AND SALES OF CIGARETTES, ETC. 18 (June 1, 1998) ("POLLAY COMMENT"); Richard W. Pollay et al., *The Last Straw? Cigarette Advertising and Realized Market Share Among Youths and Adults, 1979-1993*, 60 J. Marketing 1, 11 (1996) ("The most important [public policy implication from our study] stems from our finding that, whether or not intended, cigarette advertising is significantly related to adolescents' smoking behavior.").

[13] *See* K. Michael Cummings et al., Discrepancies in Cigarette Brand Sales and Adult Market Share: Are New Teen Smokers Filling the Gap?, 6 TOBACCO CONTROL S38, S38 (1997).

[14] *See* Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149, 3149 (1991).

This unrelenting exposure of children and adolescents to tobacco advertisements is, at best, an unavoidable consequence of the industry's deliberate strategy to foster a "friendly familiarity" with tobacco products. *See* Pollay et al. at 17. The industry bases this strategy on the well-known psychological principle that repeated exposure to a stimulus leads to favorable attitudes toward it.[15] Children and adolescents not only notice tobacco advertisements and remember them, but they also form favorable attitudes toward tobacco products from repeated exposure to advertisements that are three times stronger than the attitudes formed by adults.[16] The appeal of tobacco advertising imagery makes preventing underage smoking significantly more difficult because exposure to advertisements leads not only to favorable attitudes toward the brand being advertised (*e.g.*, Camels or Marlboros), but also toward the product (cigarettes) more generally; this favorable attitude fosters both intentions to use the product and actual consumption.[17]

Tobacco Advertising and Adolescent Immaturity. Unlike adults, who, if adequately informed, are assumed to be capable of making voluntary and rational choices, children and adolescents are generally too cognitively immature to make a rational choice to smoke when the information on which they base their decision is incomplete (and thus inac-

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[15] *See Surgeon General 2000*, Executive Summary at 16; Jeffrey Jensen Arnett & George Terhanian, Adolescents' Responses to Cigarette Advertisements: Links Between Exposure, Liking, and the Appeal of Smoking, 7 TOBACCO CONTROL 129, 132 (1998).

[16] *See* POLLAY COMMENT at 15; Pollay et al. at 12; John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking: Evidence from California*, 266 JAMA 3154, 3157-58 (1991); Joe B. Tye et al., *Tobacco Advertising and Consumption: Evidence of a Causal Relationship*, 8 J. PUB. HEALTH POL'Y 492, 498-501 (1987).

[17] *See* Ellen Feighery et al., *Seeing, Wanting, Owning: The Relationship Between Receptivity to Tobacco Marketing and Smoking Susceptibility in Young People*, 7 TOBACCO CONTROL 123, 128 (1998); Pollay et al. at 12.

curate). Youth rely more on social factors in making decisions than do adults; and this reliance correlates perfectly with the tobacco industry's strategy of influencing the perceptions and attitudes not only of smokers and pre-smokers, but also of their families and friends. *See* Tye et al. at 498.

Marketing experts know that teens, who are often uncertain about themselves and who want to belong and be popular, are especially susceptible to advertising and peer group influences as they actively search for cues for the "right" way to look and behave. Research shows that by high school, teens use possessions and "badge products," such as cigarettes, to express their identities, to explore the world and their newfound freedoms in it, and to rebel against the authority of parents and others. *See* Pollay et al. at 19-20.

Although the tobacco industry is no longer permitted to use cartoons such as the "Joe Camel" character to solicit young people overtly, it nonetheless understands that its advertising imagery — themes of independence, adventure-seeking, social approval, sexuality, success, sophistication, and an active and healthy lifestyle — resonates with adolescent needs for autonomy and freedom from authority. As one manufacturer acknowledged: "Smoking a cigarette for the beginner is a symbolic act. . . . 'I am no longer my mother's child,' 'I am tough,' 'I am an adventurer,' 'I'm not a square.' . . . As the force from the psychosocial symbolism subsides, the pharmacological effect takes over to sustain the habit . . . ."[18] The highly repetitive "healthy lifestyle" and "cool attitude" themes of tobacco ads, presented by youthful-looking models, serve to normalize and glamorize smoking.

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[18] Philip Morris Report of Fall 1969, *Why One Smokes*, First Draft of Annual Report to Philip Morris Board by V.P. for Research and Development, *available at* www.tobaccodocuments.com/view.cfm?docid=1003287836/7848&source=SNAPPM&showimages=yes.

The ads lead adolescents to believe that tobacco use is socially acceptable, safe, and healthy.[19]

The ubiquitous ads also cause teens seriously to distort the prevalence and popularity of smoking among their peers and adults.[20] The overestimation is understandable, when, in Massachusetts for example, more than half of retail-storefront ads are for tobacco. *See* Massachusetts Department of Public Health, *Massachusetts Operation Storefront 1998*, at 5 (1998) ("*Storefront 1998*"). Youth overestimation of smoking prevalence is of great concern to health officials because it is a strong predictor of teen smoking.[21]

While overestimating the prevalence and attraction of smoking, teens simultaneously underestimate the nature of nicotine addiction and the serious adverse health effects of tobacco use. Studies show that adolescents "simply do not appreciate the personal relevance of the long-term statistical risks of multiple diseases, and they suffer from a profound inability to understand the power of nicotine." Bonnie & Lynch at 35. Feeling immortal, they falsely assume that they can control the long-term risks of tobacco simply through personal choice. *See id.* at 34-35. Whereas only five percent of high school seniors who smoke believe they will be smoking five years after graduation, in fact 73 percent are still smoking an average of eight years later. *See* Tye et al. at

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[19] *See* POLLAY COMMENT at 15; *see also* Pollay et al. at 5 (finding that even brief cigarette advertising exposure in a laboratory setting can result in teens having more favorable thoughts about smokers, enhanced attitudes and increased awareness about tobacco use, and changed brand preferences).

[20] *See* Howard Leventhal et al., *Is the Smoking Decision an Informed Choice?*, 257 JAMA 3373, 3374 & tbl.1, 3375-76 (1987) (finding that young people greatly overestimate the extent to which their peers and adults smoke; the mean youth estimate of adult smokers was 66 percent, while national data indicate that about 30 percent of adults smoke).

[21] *See* Pollay et al. at 4; Laurie Chassin et al., *Predicting the Onset of Cigarette Smoking in Adolescents: A Longitudinal Study*, 14 J. APPLIED PSYCHOL. 224, 239 (1984).

503. The reality is that, once they begin to smoke regularly, half of adolescent smokers will not quit successfully for at least 16 to 20 years, and half of those who have not quit by then will die from a smoking-related disease.[22]

Taken together, this overestimation of smoking prevalence and attraction and underestimation of the risks of tobacco use cast serious doubt on whether an adolescent's decision to smoke is an informed choice or decision in any meaningful sense. *See* Bonnie & Lynch at 34-35; Leventhal et al. at 3376. Tobacco advertising, which exposes immature and unsophisticated teens to incomplete and thus inherently deceptive information, fundamentally distorts (and undermines the fairness of) the process by which consumers typically evaluate products and decide whether to use them.

c. Recent Studies Specifically Linking Advertising to Underage Smoking

Recent studies demonstrate that tobacco advertising is one of the most important — if not *the* most important — factors that impact a teen's decision to smoke.[23] One such study reports that, among California youth, "it is clear that the effect of advertising and promotional activities precedes the development of susceptibility to smoking. The effect is strong and specific, with at least 34% of experimentation with cigarettes attributed to these activities."[24] A second study found similar associations between advertising and the

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[22] *See* John P. Pierce et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511, 515 (1998) ("Tobacco Industry Promotion"); Elizabeth A. Gilpin et al., *Are Adolescents Receptive to Current Sales Promotion Practices of the Tobacco Industry?*, 26 PREVENTIVE MED. 14, 20 (1997).

[23] *See Surgeon General 2000* at 7; Gilbert J. Botvin et al., *Smoking Behavior of Adolescents Exposed to Cigarette Advertising*, 108 PUB. HEALTH REPS. 217, 223 (1993); Michael Klitzner et al., *Research Report: Cigarette Advertising and Adolescent Experimentation with Smoking*, 86 BRIT. J. ADDICTION 287, 296-97 (1991).

[24] *See* Pierce et al., *Tobacco Industry Promotion* at 514-15.

decision to start smoking among youth in Massachusetts.[25] A third study, also of Massachusetts youth, found that brand-specific magazine advertising exposure in 1993 was highly correlated to decisions by teens to begin smoking over the next four years.[26] Indeed, beyond linking advertising exposure to the decision to smoke, the growing body of recent research shows that exposure to cigarette marketing is a more important predictor of youth experimentation with cigarettes than is parental or sibling smoking.[27]

3. The Impact of Outdoor Advertising on Youth in Massachusetts

The impact of outdoor advertising — including storefront ads, sidewalk "sandwich boards," and outward-facing ads inside stores — on youth is enormous, despite the relatively small amount of money the tobacco industry spends on such advertising.[28] Outdoor advertisements, because they are intrusive and vivid, are ideal for the image-based advertising tactics employed by the tobacco industry to attract youth smokers. Because of their fixed locations, outdoor ads produce high levels of repeated exposure to kids who regularly

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[25] *See* Lois Biener & Michael Siegel, *Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference*, 90 AM. J. PUB. HEALTH 407, 409-10 (2000).

[26] *See* Linda G. Pucci & Michael Siegel, *Exposure to Brand-Specific Cigarette Advertising in Magazines and Its Impact on Youth Smoking*, 29 PREVENTIVE MED. 313, 315-18 (1999).

[27] *See* Caroline Schooler, *Seventh Graders' Self-Reported Exposure to Cigarette Marketing and Its Relationship to Their Smoking Behavior*, 86 AM. J. PUB. HEALTH 1216, 1220 (1996) (finding that adolescents' perceived exposure to tobacco advertising is associated with self-reported tobacco use even *after* the powerful influences of friends and family are controlled for); *see also* Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538, 1545 (1995); Bruce K. Armstrong, *Influence of Education and Advertising on the Uptake of Smoking by Children*, 152 MED. J. AUSTL. 117, 120 (1990).

[28] In 1999, the industry spent less than $54 million (0.7 percent of total expenditures) on outdoor advertising. *See FTC Report 1999* at tbl.3F.

travel routes that pass by, or who frequent, the stores where these ads appear.[29] Most importantly, unlike newspapers and magazines, outdoor advertisements are unavoidable and produce a captive audience.

In Massachusetts, as elsewhere, outdoor tobacco advertisements are concentrated near schools. A 1996 study of six Boston neighborhoods found that "youth are heavily exposed to stationary, outdoor cigarette advertising, that this exposure is intense in areas close to public schools, that it is more intense in neighborhoods with more children . . . ." Linda G. Pucci et al., *Outdoor Tobacco Advertising in Six Boston Neighborhoods: Evaluating Youth Experience*, 15 AM. J. PREVENTIVE MED. 155, 158 (1998). Even more troubling, a 1998 study of more than 3,000 vendors found that "[s]torefronts located within 1,000 feet of a school were significantly more likely to display tobacco advertisements, and displayed more tobacco advertisements per vendor, than did storefronts located farther away from schools." *Storefront 1998* at 11. The majority of ads were displayed in convenience stores and gas stations, where illegal tobacco sales to youth are highest. *See id.* at 5.

4. The Proven Relationship Between Advertising Bans and Diminution in Youth Smoking

There is abundant evidence that, in countries where advertising has been banned or severely restricted, the percentage of young people who smoke has decreased more rapidly than in countries where tobacco promotion has been less restricted. *See* Toxic Substances Board, *Health or Tobacco: An End to Tobacco Advertising and Promotion*, at 64 (Wellington, New Zealand 1989) ("*Toxic Substances Board*"). Experience with these advertising bans provides the most re-

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[29] Leo Burnett, Marlboro's original advertising executive, described outdoor advertising as a vital factor in creating the success of Marlboro because its low cost enabled him to saturate the market and produce multiple exposures. LEO BURNETT, COMMUNICATIONS OF AN ADVERTISING MAN 217 (1961); *see also* POLLAY COMMENT at 15.

liable data on the impact of tobacco advertising, as they cause large changes in advertising volume and there is no doubt about causation. The British Department of Health evaluated the effects of full or partial advertising bans in Norway, Finland, Canada, and New Zealand and concluded that the advertising ban "indicates a significant effect. In each case the banning of advertising was followed by a fall in smoking on a scale which cannot reasonably be attributed to other factors."[30] This proof of smoking reduction is critical: By a conservative estimate, for each one percent of American teenagers who decide to smoke but who would not do so as a result of changed advertising practices, *there would be 10,000 fewer children in the United States hooked on tobacco each year — and at least 3,000 fewer projected deaths annually*. *See* POLLAY COMMENT at 18.

SUMMARY OF ARGUMENT

Far from applying strict scrutiny, as petitioners suggest, the Court should review the challenged regulations under a deferential standard. Because outdoor and in-store tobacco advertisements near schools and playgrounds exert an undue influence on the captive audience of youth who are exposed to such ads on a daily basis, this case presents precisely the sort of threat of coercion and deception that justifies lesser protection for commercial speech. Moreover, because selling tobacco products to minors is unlawful, the commercial promotion of such products near schools and playgrounds is less worthy of constitutional protection.

In any event, the challenged regulations satisfy even strict scrutiny. The Commonwealth's interests in reducing youth demand for tobacco products and eliminating overreaching and unfairness in their marketing are not only substantial, but compelling. The voluminous factual record amply confirms the commonsense propositions that tobacco ad-

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[30] Clive Smee, Department of Health, Economics and Operational Research Division, *Effect of Tobacco Advertising on Tobacco Consumption: A Discussion Document Reviewing the Evidence* 22 (1992).

vertising significantly influences youth smoking and that the challenged restrictions directly help suppress youth demand for tobacco products. Finally, because the regulations apply only to tobacco advertisements that make youth a captive audience, and thus leave open many alternative avenues for petitioners to communicate with adults, they are no more restrictive than necessary.

ARGUMENT

I. STRICT SCRUTINY OF THE CHALLENGED REGULATIONS IS PLAINLY INAPPROPRIATE.

Petitioners' argument that this case provides a vehicle for the unprecedented application of strict scrutiny to a regulation of commercial speech could not be more misplaced. While Legacy takes no position on the level of scrutiny that should apply in commercial speech cases generally, there are at least two factors here that warrant deferential review of the Commonwealth's regulations. First, given the immature and unsophisticated target audience and its captive nature, the incomplete and inaccurate tobacco ads at issue create precisely the kind of unfairness and deception in the consumer marketplace that make regulation appropriate. Second, such advertisements promote transactions that are in fact unlawful.

These factors make clear that this Court should apply, *at most*, the intermediate scrutiny standard articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980). "The meaning of any expression and the legitimacy of its regulation can only be determined in context." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 426-27 (1992) (Stevens, J., concurring). The context in this case is what is by far the Commonwealth's most profound public health crisis: Tobacco kills more Americans annually than AIDS, alcohol, car accidents, homicides, suicides, illicit drugs, and fires *combined*. *See* FDA Final Rule, 61 Fed. Reg. at 44,398. Massachusetts is entitled to broad latitude to address this crisis.

A. The Challenged Regulations Target Inherently Unfair Speech to Which Children Are Involuntarily Exposed, and Such Speech Is Entitled to Minimal, if Any, First Amendment Protection.

This Court has long recognized a "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Based on this distinction, the Court has concluded that "[t]he Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).[31]

Petitioners argue incorrectly that intermediate scrutiny should not apply here because that relatively deferential standard is limited to situations where "the government regulates advertising based on those particular commercial aspects of the speech that justify affording lesser constitutional protection to commercial speech in the first place." Lorillard Br. at 34. In fact, the Massachusetts regulations plainly *are* based

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[31] While petitioners and their *amici* make much of the fact that the challenged restrictions are content-based, *see, e.g.*, U.S. Smokeless Tobacco Br. at 10-11; Nat'l Advertisers Br. at 4-8, that is true of *all* commercial speech regulation, because such regulation necessarily focuses on a particular kind of speech. In any event, the Court's "decisions demonstrate that content-based restrictions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment." *R.A.V.*, 505 U.S. at 420 (Stevens, J., concurring).

Moreover, petitioners are clearly wrong that the exemption of anti-tobacco public service messages from the advertising restrictions warrants strict scrutiny as viewpoint discrimination. *See* Lorillard Br. at 39-41. Commercial speech restrictions by their nature apply only to advertisements that *promote* a good or service — such as tobacco, gambling, or legal services — because only such ads fit within the definition of commercial speech by "proposing a commercial transaction." *Ohralik*, 436 U.S. at 456.

on the attributes of outdoor and in-store tobacco advertisements that make such commercial speech worthy of far less constitutional protection: They are based squarely on the undue influence that such coercive advertising has in stimulating its youthful audience to consume a lethal product.

1. The Court's Precedents Concerning Laws Designed To Protect Children From Harmful Speech Warrant Deference Here.

The challenged regulations make clear on their face that they aim to protect children from commercial speech that directly influences the decision whether to use tobacco products, which, in turn, lead to catastrophic health consequences. The regulations were adopted "to address the incidence of [tobacco] use by children under legal age." 940 C.M.R. § 21.01; *see also id.* § 22.01. They apply only to advertisements that children cannot avoid even with the most careful parental oversight, and they apply only within 1,000 feet of a school or playground.

This Court has repeatedly recognized that such laws constitute a key exception to the rule that "people will perceive their own best interests if only they are well enough informed." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). While a state *generally* "does not have . . . broad discretion to suppress truthful, nonmisleading information for paternalistic purposes," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996), that is not the case where the state acts to protect *children* from harmful speech. The reason for this distinction is that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). Because a child does not make decisions in the same rational manner as

an adult, the principle that paternalistic regulations of speech are unnecessarily restrictive is inapposite.[32]

Thus, "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *Ginsberg*, 390 U.S. at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). The Court has made this distinction time and again. Based on the government's compelling interest in protecting children from harm, the Court has upheld speech-restrictive laws that would have been unconstitutional if adults were the only audience exposed to the speech.[33]

Relying on such cases as *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Butler v. Michigan*, 352 U.S. 380 (1957), petitioners and their amici argue that the Commonwealth's interest in protecting children cannot justify blocking adult access to tobacco companies' speech. See,

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[32] Recent opinions expressing an "aversion towards paternalistic governmental policies" are grounded on the idea that laws should not prevent "*men and women*," — *i.e.*, *adults* — "from hearing facts that might not be good for them." *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) (emphasis added); *see also id.* at 528 (Thomas, J., concurring) (advocating heightened scrutiny with respect to regulations that ignore principle that "informed *adults* are the best judges of their own interests") (emphasis added). The Court has never held that it is suspect for a state to shield *children* from commercial speech for "paternalistic" purposes.

[33] *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (upholding Cable Act provision based in large part on "[t]he importance of the interest at stake here — protecting children from [harmful speech]"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684-85 (1986) (upholding sanctions on student based on lewd speech to captive audience of children); *FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1978) (upholding restrictions protecting children from indecent radio broadcast); *Ginsberg*, 390 U.S. at 631-33 (upholding statute that banned the sale of sexually explicit books to children).

e.g., Lorillard Br. at 47; Nat'l Advertisers Br. at 9-17. But these cases are easily distinguished, because, unlike here (a) the speech at issue did not render children a captive audience, and (b) the regulations in any event imposed far broader restrictions on such speech. Moreover, while the Court has stated that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," *Bolger*, 463 U.S. at 74, the regulations here not only leave tobacco companies free to mail advertisements to prospective customers (and to communicate through other channels, see *infra* Part II.C.2), but they target outdoor ads that often are viewed from a sandbox.

2. Strict Scrutiny Is Not Appropriate Where, as Here, the Speech in Question Is Incomplete and Thus Deceptive in Light of Its Immature Audience.

Although petitioners rely extensively on *44 Liquormart, Inc.*, that decision actually supports the challenged regulations, which restrict a form of "aggressive sales practice[] that [has] the potential to exert 'undue influence' over consumers." 517 U.S. at 498 (citation omitted). The Commonwealth restricts only those tobacco advertisements — outdoor ads near schools and playgrounds and in-store ads placed at kids' eye level — that are most likely to coerce and unfairly ensnare a captive audience of children, leaving them vulnerable to the inaccurate and destructive message (among others) that tobacco is associated with a healthy and attractive lifestyle. Such ads typically contain images that appeal particularly to teens — images of rebellion, romance, success, and sophistication. As the court of appeals recognized, these images lead children to believe that tobacco products are "part of the 'good life.'" *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 49 (1st Cir. 2000). By presenting incomplete information, such ads deceptively mask the devastation that tobacco actually causes.

Apart from the incomplete — and thus inherently inaccurate — images used by tobacco companies, the very ubiquity of tobacco ads leads immature and impressionable teens to overestimate the prevalence of smoking. And this overestimation, which makes cigarettes appear normal and innocuous, is a leading predictor of who will decide to smoke. *See supra* at 9. To "eliminate deception and unfairness in the way [tobacco products] are marketed, sold, and distributed," 940 C.M.R. §§ 21.01, 22.01, Massachusetts has done no more than require that commercial information about tobacco products "appear in such a form [and location] . . . as [is] necessary to prevent" such unfairness and deception. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24.[34] In these circumstances, this Court's precedents make clear that strict scrutiny is inappropriate.[35]

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[34] Contrary to petitioners' assertion that the Commonwealth conceded the "truthful and nonmisleading" nature of the tobacco ads at issue, Lorillard Br. at 35, the Attorney General's brief below did "*not* concede that the Companies' advertising 'concern[s] lawful activity and [is] not misleading,' such as to qualify for constitutional protection under the first prong of *Central Hudson*." Atty. Gen. 1st Cir. Br. at 31 n.15 (emphasis added) (alterations in original). Rather, the Attorney General did not seek summary judgment on that issue because the regulations directly promote a substantial interest and are narrowly tailored. *See id.*

[35] *See, e.g., 44 Liquormart, Inc.*, 517 U.S. at 501 ("less than strict review" is appropriate in such circumstances); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring) ("[R]ationales for treating commercial speech differently under the First Amendment" include "the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information."); *Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than inform it."); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (applying deferential standard of review in upholding restriction on marketing techniques that "enhance[d] the opportunity for misleading practices"); *see also R.A.V.*, 505 U.S. at 415 (Blackmun, J., concurring) (noting "[t]he simple reality . . . that the Court will never provide . . . cigarette advertising the level of protection customarily granted political speech," and thus that a restriction on tobacco advertising rests on the same principles that warrant according commercial speech less protection in the first place).

B. The Protection Appropriate for the Speech at Issue Is Further Diminished by Its Promotion of Unlawful Transactions.

While commercial speech promoting *lawful* activities is entitled to some measure of protection under the First Amendment, *see Florida Bar*, 515 U.S. at 623, commercial speech promoting *unlawful* transactions — such as the sale of cigarettes to minors — is entitled to none. *See Central Hudson*, 447 U.S. at 563; *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973). The tobacco ads at issue have both the purpose and effect of promoting tobacco use by youth, and they thereby undermine the Commonwealth's prohibition against the sale of tobacco products to minors.[36] Even to the extent that tobacco ads have a lawful purpose — encouraging adults to buy tobacco products — the fact that the industry's survival depends on replacing the 1.7 million smokers who die or quit each year with kids makes clear that encouraging youth to smoke is an important, but illegitimate, end. The Commonwealth's power to enforce its prohibition against tobacco sales to minors concomitantly entitles it to leeway to restrict speech that compromises that prohibition.

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[36] Petitioners' argument that the Master Settlement Agreement ("MSA") now prevents them from targeting youth in their advertisements, *see* Lorillard Br. at 45-46, is unpersuasive. The fact that a state attorney general can go to court in an attempt to show that a particular ad has a "primary purpose" of targeting youth, MSA § III(a) (J.A. 260), by no means signifies an end to such practices. Nor does it suggest that ads lacking such a "primary purpose" do not influence youth smoking when presented in areas where youth inevitably congregate. The tobacco companies' suggestion that youth are no longer a target for tobacco advertising — despite the fact that teens represent virtually all of the industry's new customers — is no more credible than their historic claims that smoking does not cause cancer or that nicotine is not addictive.

II. THE RESTRICTIONS ARE CONSTITUTIONAL UNDER *CENTRAL HUDSON* AND WOULD SURVIVE EVEN STRICT SCRUTINY.

Whatever level of scrutiny the Court applies, it should uphold the challenged regulations. There is no question that the Commonwealth's interests in reducing youth demand for tobacco products and eliminating overreaching and unfairness in their marketing are compelling. Moreover, the voluminous factual record compiled by Massachusetts powerfully confirms the commonsense propositions that tobacco advertising significantly influences youth smoking and that the challenged restrictions directly help suppress youth demand for tobacco products. Finally, because restricting ads that make children a captive audience is essential to suppressing youth demand for tobacco products, and because the restrictions leave open many alternative avenues for petitioners to communicate with their adult customers, the regulations are no more restrictive than necessary.

A. Reducing Teen Demand for Tobacco Products Is a Compelling Government Interest.

The Commonwealth has a compelling interest in reducing youth demand for tobacco products in an effort to reduce underage smoking. Data show that underage smoking leads to addiction, disease, and, in far too many cases, death. Adults who began smoking in their youth are more likely to be heavier smokers than those who began smoking as adults, *see* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,317; their level of nicotine dependence is generally higher, making it more difficult for them to quit, *see Surgeon General 1994* at 30-34; and males have a greater risk of lung cancer and other smoking-related diseases than males who begin smoking later, *see Surgeon General 1989* at 45 fig.3. In addition to the lasting effects of smoking on adults who began as youths, youth smoking also causes significant health problems for children and adolescents. *See Surgeon General 1994* at 15-29. For these and other reasons "tobacco

use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Brown & Williamson*, 529 U.S. at 161.

B. The Challenged Regulations Directly and Materially Advance the Commonwealth's Interest in Reducing Youth Demand for Tobacco Products and, in Fact, Are Necessary to Serving That Interest.

The voluminous record below confirming the link between tobacco advertising and youth smoking more than satisfies the Commonwealth's burden of demonstrating that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Indeed, the regulations are "necessary to serve the [Commonwealth's] asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

1. There Is Abundant Evidence That Tobacco Advertising Stimulates Youth Demand for Tobacco Products and That Advertising Restrictions Help Suppress Such Demand.

Overwhelming evidence supports the link between tobacco advertising and youth smoking. As described above (p.10), three recent studies have associated exposure to tobacco advertising with the decision by youths to start smoking. Both the FDA and the Surgeon General have concluded that advertising plays a major role in influencing children and adolescents to begin smoking. *See* FDA Final Rule, 61 Fed. Reg. at 44,466; *Surgeon General 1994* at 195. The FDA reviewed the scientific evidence and concluded that:

> Studies show that . . . exposure to tobacco advertising leads to favorable beliefs about tobacco use, that advertising plays a role in leading young people to overestimate the prevalence of tobacco use, and that these factors are related to young people's tobacco initiation and use.

FDA Final Rule, 61 Fed. Reg. at 44,488. Other studies also show that tobacco brand advertising has a disproportionate effect on youth smoking preferences in comparison to its effect on adults.[37]

The Commonwealth need not demonstrate but-for causation to justify the challenged restrictions. Rather, it must show only that the advertising it seeks to restrict promotes youth demand for tobacco products. And there is simply no question that it does.[38] As the scientific literature explains, regulations on tobacco advertising will not, "either by themselves or in combination with other tobacco control measures, . . . completely solve the teenage nicotine addiction problem, but they will certainly directly and materially contribute toward reducing teenage tobacco use." POLLAY COMMENT at 18.

In addition to the evidence linking tobacco advertising to youth smoking, there is also persuasive evidence that the specific approach the Commonwealth is pursuing here — tobacco advertising restrictions — is likely to succeed in reducing youth smoking. As discussed above (p.12-13), a variety of international examples demonstrate that severe restrictions or bans on tobacco advertising decrease youth smoking rates faster than they would have decreased otherwise. *See* Smee at 17-18; *Toxic Substances Board* at 64. These studies, coupled with the studies that correlate tobacco advertising with youth demand for tobacco products, demonstrate that the challenged restrictions will substantially reduce youth smoking and the harm it causes.

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[37] For example, minors smoke the three most heavily advertised brands — Marlboro, Camel, and Newport — at rates far higher than adults, while adults purchase a greater variety of brands that receive little advertising exposure. *See* Pollay et al. at 8 & tbl.1, 11.

[38] *See, e.g.*, D.L. O'Connell et al., *Cigarette Smoking and Drug Use in Schoolchildren: II Factors Associated with Smoking*, 10 INT'L J. EPIDEMIOLOGY 223, 230 (1981) ("Our data suggest to us that intervention in the field of cigarette advertising may be the most direct and effective means of reducing the prevalence of smoking in children.").

2. This Evidence Is Sufficient To Demonstrate That the Challenged Regulations Will Alleviate the Harms of Youth Smoking to a Material Degree.

The evidence submitted below is more than sufficient to meet the Commonwealth's burden under *Central Hudson* and this Court's other commercial-speech precedents. Indeed, it is sufficient to meet strict scrutiny because it demonstrates that advertising restrictions are an integral and necessary part of any effective effort to reduce underage smoking. Contrary to the suggestions of petitioners and their *amici*, *see* Lorillard Br. at 42-44; Newspaper Ass'n Br. at 11-14, neither the First Circuit nor the Commonwealth attempted to justify the restrictions based solely on the commonsense link between advertising and youth smoking.

Rather, the justification for the regulations consists of precisely the sort of scientific evidence, peer-reviewed studies, and historical data that this Court has previously found sufficient to justify advertising restrictions. *See Florida Bar*, 515 U.S. at 626-29.[39] Indeed, where the government's interest is compelling, as here, this Court has held that empirical data are not required at all. *See Burson*, 504 U.S. at 208; *see also Central Hudson*, 447 U.S. at 569 (even where state interest in reduced energy consumption was merely substantial, Court found "direct link" between advertising ban and that interest notwithstanding absence of empirical evidence).[40]

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[39] Petitioners cannot defeat the thorough legislative record that supports the challenged restrictions by pointing to the views of two professors who dispute some of the Commonwealth's scientific evidence. *See* Lorillard Br. at 42 n.6. The parties disputed some of the evidence presented in *Florida Bar*, 515 U.S. at 640 (Kennedy, J. dissenting), yet this Court had no trouble concluding that the government had met its burden given the clear weight of the evidence, *see id.* at 628-29.

[40] Contrary to the claims of petitioners and their *amici*, *see* Lorillard Br. at 42; Newspaper Ass'n Br. at 15-18, the Commonwealth is not required to prove a "causal link" between advertising and youth smoking through adjudicative facts or through an evidentiary hearing. First, "cau-

In contrast to the strong evidence in this case demonstrating a direct correlation between advertising restrictions and a reduction in youth smoking, the cases relied on by petitioners in which this Court has struck down limitations on speech involved restrictions that were only remotely related to the asserted state interest. For example, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993), this Court held that the "benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain[ed] in place was . . . 'minute'" and did not materially advance interest in promoting safety and aesthetic interests. Similarly, in *Virginia Board of Pharmacy*, this Court concluded that the advertising ban at issue did "not directly affect professional standards one way or the other." 425 U.S. at 769.[41] Here, the record contains evidence showing *both* that tobacco advertising promotes youth demand for tobacco products and youth smoking *and* that tobacco advertising restrictions reduce youth smoking. The record is thus more than sufficient to satisfy either intermediate or strict scrutiny.

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sation" is simply the wrong standard; the Court has never required a state to show anything other than that its restriction of commercial speech has a material *influence* on the problem the state is attempting to address. Second, the Court has not required evidentiary hearings, *see, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 n.6 (1999) (government can meet its evidentiary burden by submitting "secondary sources and declarations"); rather, challenged restrictions need only be supported on the *legislative* record, which is ample here. *See Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) ("[T]he issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question.").

[41] *See also Bates v. State Bar*, 433 U.S. 350, 378 (1977) (overturning restriction on advertising designed to ensure "quality" of legal work, because ban was "an ineffective way of deterring shoddy work"); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977) (invalidating ban on use of "for sale" signs, because ban was only remotely connected (if at all) to goal of integrated housing).

C. The Challenged Regulations Are No More Extensive Than Necessary To Serve the Commonwealth's Compelling Interests.

Finally, the challenged regulations are no more extensive than necessary to serve the Commonwealth's compelling interest in reducing youth demand for tobacco products, and they are narrowly tailored to preserve ample alternative channels through which tobacco companies can communicate with adult customers. Indeed, the nature of the tobacco ads at issue and the Commonwealth's need to reduce youth demand for tobacco demonstrate that the regulations are the least restrictive means to this end.

1. Prohibiting Tobacco Ads That Make Children a Captive Audience Is Necessary To Suppress Youth Demand for Tobacco.

Massachusetts already has employed a variety of means to combat smoking by minors, with relative success,[42] yet underage smoking remains an enormous problem. Consistent with finding of the U.S. Department of Health and Human Services that even the most aggressive and punitive efforts to reduce sales of tobacco products to minors will fail to prevent youth from using tobacco, *see* Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492, 1502 (Jan. 19, 1996) ("HHS Final Rule"), the Commonwealth determined that it is imperative to reduce youth *demand* for tobacco to make a serious impact on usage. Not only is prohibiting tobacco ads in the locales where youth congregate closely tailored to that goal, but it is an indispensable means to that end.[43]

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[42] *See* United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* (1999) (recognizing Massachusetts as a leader in tobacco control).

[43] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (if the city had a "sufficient basis for believing that billboards" pose a threat to the public, "then obviously the most direct and perhaps

By contrast, all of the supposedly obvious and more effective alternatives suggested by the tobacco companies, *see, e.g.*, Lorillard Br. at 45, relate exclusively to youth *access* to cigarettes, rather than youth *demand* for them. While access restrictions are an important part of any effort to combat youth tobacco use, such measures cannot fully address the epidemic of youth smoking, because youth always will be able to obtain cigarettes from friends and relatives. *See* HHS Final Rule, 61 Fed. Reg. at 1502. The access-related measures offered up by the tobacco companies thus cannot be considered "less-burdensome alternatives to the restriction on commercial speech," *Discovery Network*, 507 U.S. at 417 n.13 (1993), because they are not really alternatives at all.[44]

In particular, the fact that outdoor and in-store advertisements near schools and playgrounds are viewed daily by an audience of children who cannot avoid them demonstrates the close nexus between the challenged regulations and the goal of reducing youth demand for tobacco products. In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), this Court upheld Utah's complete ban on outdoor tobacco advertisements against an Equal Protection Clause challenge, relying on the important difference between outdoor advertising and other forms. As Justice Brandeis observed for the Court:

> Billboards, . . . placards and such are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people . . . have the mes-

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the *only* effective approach to solving the problems they create is to prohibit them") (emphasis added).

[44] In any event, as the First Circuit recognized, "[t]here are legitimate reasons why the state may not want to make underage tobacco use a crime; after all, the state's motivation is to protect children, not to institutionalize them." *Consolidated Cigar Corp.*, 218 F.3d at 51.

> sage of the billboard thrust upon them by all the arts and devices that skill can produce.

Id.[45]

This is precisely why Massachusetts decided to restrict outdoor advertising and in-store ads at kids' eye level, but *not* print advertising or other channels of communication. Absent the Massachusetts regulations, a child walking down the street to a school (where attendance is compulsory) or to a playground would be "practically helpless" to avoid bombardment by tobacco advertising. *Kovacs*, 336 U.S. at 86-87. That the regulations incidentally restrict some advertising that may be intended for adults does not undermine their validity: "[I]n order to achieve a broader objective such regulations may incidentally, *even deliberately*, restrict a certain amount of speech not thought to contribute significantly to the dangers with which the Government is concerned." *Greater New Orleans*, 527 U.S. at 194 (emphasis added).

2. The Challenged Restrictions Leave Open Many Alternative Channels for Tobacco Companies To Advertise to Adults.

The regulations preserve many avenues through which tobacco companies can communicate with adult customers. Indeed, this availability of alternative channels for speech means that Massachusetts could have banned *all* outdoor and

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[45] *See also Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (upholding restriction on the use of sound trucks because they left the public no choice but to be exposed to the speaker's message); *Lehman v. Shaker Heights*, 418 U.S. 298, 302 (1974) (distinguishing captive-audience situations from "the traditional settings where First Amendment values inalterably prevail"); *Rowan v. United State Post Office Dep't*, 397 U.S. 728, 736 (1970) ("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."). The Court also relied on this "captive audience" rationale in *Pacifica*, because the radio broadcast at issue was "uniquely pervasive." 438 U.S. at 748. Here, there is an even stronger case for upholding the challenged regulations: "The radio can be turned off, but not so the billboard." *Packer*, 285 U.S. at 110 (internal quotation and citation omitted).

in-store tobacco ads — not just those within 1,000 feet of a school or playground — and the objection regarding the reach of the 1,000-foot radius is thus a red herring. Even with a total ban on such ads, tobacco companies would remain free to advertise to adults in magazines and other print media, over the Internet, via direct mail, and in stores (above five feet off the ground).[46] In fact, although the advertising subject to regulation here qualitatively affects youth smoking in important ways, the restrictions on outdoor and in-store advertising affect only a quantitatively small portion of tobacco ads: Tobacco companies spent only $53 million on outdoor ads and $329 million on point-of-sale ads out of a total of $8.24 billion in advertising expenditures in 1999. *See FTC Report 1999* at tbl.3F.

This Court's commercial-speech precedents make clear that, by leaving open these alternative channels of communication, Massachusetts has regulated speech no more extensively than necessary. In *Florida Bar*, for example, the Court upheld a restriction on direct-mail solicitations for legal services because other channels remained open, including the opportunity to advertise "in newspapers and other media." 515 U.S. at 633. Here, too, because there is "no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about [tobacco] are sufficient," there is "no defect" in the Commonwealth's regulations.[47]

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[46] As the court of appeals noted, the regulations as written also permitted retailers to display small "tombstone" signs to convey information about tobacco products to adults. While the district court held that this provision was preempted by the FCLAA, and the Commonwealth did not appeal that ruling, the Commonwealth remains able to promulgate a statutorily acceptable tombstone provision. *See Consolidated Cigar Corp.*, 218 F.3d at 52 n.13.

[47] *Florida Bar*, 515 U.S. at 634; *see also Kovacs*, 336 U.S. at 88-89 ("That more people may be more easily and cheaply reached by" a certain mode of communication "is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nui-

While the challenged regulations would be valid even if not geographically limited, their application only to areas within 1,000 feet of a school or playground underscores their narrowly tailored nature. The Massachusetts Department of Health and the FDA have found that storefronts within 1,000 feet of schools and playgrounds are more likely to display tobacco ads (and more of them) than stores in other areas. *See supra* at 11-12; FDA Final Rule, 61 Fed. Reg. at 44,504, 44,507. Focusing on the areas where children are most likely to walk and play obviously demonstrates the close nexus between the advertising restrictions and the Commonwealth's child-protective goals. Petitioners repeatedly assert (Lorillard Br. at 2, 4, 45) that the geographical reach of the restrictions includes as much as 90 percent of the most populated areas of Massachusetts. But that figure is based on a survey of only three cities, *see* J.A. 161-67, and thus may be highly misleading with respect to smaller cities throughout the state. There is no question that the regulations allow tobacco companies to purchase *some* outdoor advertisements (in areas where children are less likely to be present), and to purchase in-store ads above children's eye-level. Given the multiplicity of other opportunities to purchase advertising in other forms, that is more than the Constitution requires.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the court of appeals.

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sance *when easy means of publicity are open.*") (emphasis added); *Metromedia, Inc.*, 453 U.S. at 550-51 (Stevens, J., concurring in part and dissenting in part) ("*Kovacs* . . . forecloses any claim that a prohibition of billboards must fall simply because it has some limiting effect on the communications market.").

Respectfully submitted,

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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Massachusetts' location regulations applicable to tobacco advertising are preempted by FCLAA Section 5(b).

2. Whether Massachusetts' regulation of the location of tobacco advertising and the retail placement of tobacco products violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] This case presents two issues of recurring importance to *amici* and their members: 1) whether federal law preempts the States' police powers, and 2) the scope of state authority to regulate commercial speech.

Petitioners argue that the Federal Cigarette Labeling and Advertising Act (FCLAA) expressly preempts Massachusetts' regulations concerning the location of cigarette advertising, which were adopted to reduce the incidence of illegal sales of tobacco products to minors. Petitioners construe FCLAA's express preemption provision, 15 U.S.C. § 1334(b), as providing a broad immunity from state regulation of cigarette advertising. If petitioners' position is upheld, a significant and highly deleterious encroachment on the States' police powers would result.

Petitioners also argue that Massachusetts' regulations, including its rule that tobacco products be accessible only to store personnel, violate the First Amendment. Petitioners go as far as to urge the Court to overrule longstanding commercial speech doctrine and impose "strict scrutiny" to state and local government regulations of commercial speech, except when the government regulates to protect fairness in the bargaining process. This Court, however, like *amici*, has long recognized that commercial speech can impose social and economic costs that extend well beyond the consequences of fraudulent and deceptive advertising. The Court's

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[1] The parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.3, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

commercial speech doctrine represents an appropriate accommodation of First Amendment values and the government's interests. The Court should reject petitioners' entreaties to change it.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. FCLAA's express preemption provision, 15 U.S.C. § 1334(b), does not preempt Massachusetts' regulations of the location of cigarette signs and in-store advertising. Contrary to petitioners' assertions, § 5(b) does not preempt all state "requirement[s] or prohibition[s] . . . with respect to the advertising of cigarettes" labeled in conformity with FCLAA. *Id.* 15. It preempts only those advertising requirements or prohibitions that are "based on smoking and health." *Id.*

The Court has recognized that the language of § 5(b) is susceptible to multiple interpretations. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-30 & nn 26-27 (1992). In such instances, the Court's interpretation of an express preemption provision "is informed by two presumptions about the nature of preemption." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The first is the presumption against preemption of the States' police power. *Id.* The second is that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" *Id.* at 485-86 (quoting 505 U.S. at 530 n.27).

Petitioners offer no explanation as to what the critical phrase—"based on smoking and health"—means. Their failure to do so is fatal because the express purpose of the State's regulations "is to eliminate deception and unfairness" in the marketing of cigarettes and "to address the incidence of cigarette smoking . . . by children under legal age." 940

CMR § 21.01 (reprinted at Pet. App. 105a). The regulations' substantive provisions likewise make no reference to health concerns. *See id.* §§ 21.02 - 07 as amended (reprinted at Pet. App. 105a-114a).

The unstated premise of petitioners' position is that *any* regulation of cigarette advertising that has the purpose of reducing consumption is "based on smoking and health" and is thus preempted. Construing section 5(b) at this level of generality would, however, lead to numerous absurd results and render the foregoing statutory language superfluous. The Court must therefore go beyond the ambiguous text and construe the statute in light of the presumption against preemption of state authority and with "a fair understanding of congressional purpose." *Medtronic*, 518 U.S. at 485-86 (citations omitted).

FCLAA's statement of purpose clarifies that Congress' goal was not to protect the tobacco industry from all nonuniform and confusing cigarette labeling and advertising regulations, but only those "cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2)(B). And Congress further stated that its purpose was to protect the "national economy . . . to the maximum extent *consistent with* this declared policy." *Id.* § 1331(2)(A) (emphasis added). Location restrictions do not impose a "requirement or prohibition based on smoking and health," *id.* § 1334(b), as they plainly do not involve "advertising with respect to any relationship between smoking and health." *Id.* § 1331. Whatever the precise scope of § 5(b) preemption, the provision's ambiguous language cannot be read as providing a clear and manifest expression of Congress' intent to preempt Massachusetts' regulations of the location of tobacco advertising.

2. Petitioners and their *amici* urge this Court to overrule *Central Hudson* and to apply strict scrutiny to state laws regulating any commercial speech that proposes a lawful

transaction in a truthful, non-misleading way, including their own message: buy tobacco. Petitioners' First Amendment argument should be rejected.

A. Petitioners' request that the tests for the validity of regulation of political speech and commercial speech be conjoined is ill advised and unnecessary. It overlooks the distinct rationale, reflected in this Court's cases, for providing marginally less protection for commercial speech than for political speech. The First Amendment provides maximum protection for political speech because it is integral to the political process. In analyzing commercial speech, by contrast, the Court has repeatedly recognized the substantial government interests advanced by the regulation of commercial speech. These include not only preventing unlawful activity and ensuring the fairness of the bargaining process, as petitioners acknowledge, but also protecting such individual interests as privacy and safety, and limiting the social and economic costs of certain activities to the citizenry as a whole.

B. Nor are *Central Hudson* and its progeny inadequate to maintain the balance between protection for commercial speech and the States' need to regulate in the public interest. This Court's post-*Central Hudson* cases have clarified and enhanced the protections that the First Amendment affords commercial speech, all within the analytical framework created by that landmark ruling. The Court has accomplished this principally by amplifying the evidentiary burden that state and local governments must meet when regulating truthful speech proposing lawful transactions. Under current commercial speech doctrine, a State that seeks to regulate commercial speech "must demonstrate that the harms it recites" in support of the regulation "are real[,] . . . that its restriction will in fact alleviate them to a material degree," *Edenfield v. Fane*, 507 U.S. 761, 771 (1993), and that the regulations are reasonably tailored to their objectives. *See*

Board of Trustees of State Univ. of N. Y. v. Fox, 492 U.S. 469, 476-77 (1989).

C. When reviewed under the Court's analytical framework for commercial speech, it is clear that Massachusetts' tobacco regulations are constitutional. Not only is smoking highly detrimental to children and adolescents in a variety of ways, but Massachusetts makes it a crime to sell tobacco to minors. Mass. Gen. Laws ch. 270, § 6. As the courts below found, Massachusetts has shown that the challenged regulations alleviate these real harms to a material degree, and are no more restrictive than this Court's case law permits. The judgment of the court of appeals should accordingly be affirmed.

ARGUMENT

Petitioners challenge a number of regulations adopted by the Attorney General of Massachusetts to regulate the placement of tobacco advertising. Promulgated as part of the State's comprehensive scheme to reduce the incidence of minors' smoking, the regulations address both the demand and supply sides of this important problem. At issue are "[a]dvertising restrictions," which prohibit advertising tobacco products "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school," 940 CMR § 21.04(5)(a); *see also id.* § 22.06(5), and require that "point-of-sale advertising" of tobacco products may not be "placed lower than five feet from the floor." *Id.* §§ 21.04(5)(b) & 22.06(5)(b). Petitioners also challenge the State's "retail outlet sales practices" rule, which prohibits the use of "self-service displays" and requires that retailers place tobacco products "out of the reach of all consumers, and in a location accessible only to outlet personnel." *Id.* §§ 21.04(2)(c) & (d); 22.06(2)(c) & (d).

The court of appeals correctly held that FCLAA § 5(b), 15 U.S.C. § 1334(b), does not expressly preempt the

Massachusetts Attorney General's regulations of the location of tobacco advertising and the in-store advertising and display of tobacco products. As explained below, Section 5(b) does not preempt all state "requirement[s] or prohibition[s] . . . with respect to the advertising" of cigarettes "labeled in conformity with" FCLAA. 15 U.S.C. § 1334(b); *see* Pet. Lorillard Br. 10-11; 13-24. Rather, it preempts only those requirements or prohibitions that are "based on smoking and health." *Id.* § 1344(b). None of the challenged regulations, which deal only with the placement of advertising, are based on smoking and health. They are therefore not preempted.

The court of appeals likewise correctly ruled that the State's regulations do not violate the First Amendment. Contrary to petitioners' contention, distinct legal standards apply to political and commercial speech because of the constitutional values served by these different kinds of speech. While petitioners would apply "strict scrutiny" to all non-misleading advertising about "lawful" products, the result would be to overturn more than two decades of this Court's precedents that provide government with essential power to regulate commercial speech when absolutely necessary to serve the public interest. Massachusetts has "demonstrate[d] that the harms it recites are real and that its restriction[s] will in fact alleviate them to a material degree," Pet. App. 19a (citation omitted), and that they are no more restrictive than this Court's cases permit. The judgment of the court of appeals should accordingly be affirmed.

I. FCLAA SECTION 5(b) DOES NOT PREEMPT MASSACHUSETTS' LOCATION RESTRICTIONS ON CIGARETTE ADVERTISING

Under the Supremacy Clause of the Constitution, "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). While preemption can be either express or implied, "[w]hen Congress has considered the

issue of pre-emption and has included in the . . . legislation a provision explicitly addressing that issue . . . there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517 (internal quotation and citation omitted).

Where a "statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX*, 507 U.S. at 664; *Medtronic*, 518 U.S. at 484. *See also Cipollone*, 505 U.S. at 517. The Court "must give effect" to the plain meaning of a statute in the absence of "good reason to believe Congress intended" otherwise. *Id.* at 521 (internal quotation and citation omitted). Where, as here, however, an express preemption provision is susceptible to multiple interpretations, the Court's "interpretation is informed by two presumptions about the nature of pre-emption." *Medtronic*, 518 U.S. at 485.

The first presumption recognizes that "the States are independent sovereigns in our federal system," which exercise broad police power that Congress is reluctant to displace. *Id.* Thus, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' " the Court " 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption is fully operative here, as the States have long exercised their police power to regulate the location of billboard advertising, *see, e.g., St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526-31 (1917), and this Court has upheld a state prohibition of tobacco advertising on billboards and placards. *See Packer Corp. v. Utah*, 285 U.S. 105, 108-11 (1932); *see also* Utah

Code § 76-10-102 (2001) (misdemeanor to display tobacco advertising on "any billboard, streetcar sign, streetcar, bus, [or] placard," except on sign in front of retail outlet).

The second presumption is that the Court's "analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic*, 518 U.S. at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *see also Cipollone*, 505 U.S. at 516. The Court has thus explained that "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' " *Medtronic*, 518 U.S. at 485-86 (quoting *Cipollone*, 505 U.S. at 530 n.27) (opinion of Stevens, J.). While this understanding "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it," *id.* at 486 (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment), "the 'structure and purpose of the statute as a whole'" is "also relevant." *Id.* (quoting *Gade*, 505 U.S. at 98 (opinion of O'Connor, J.)). Through the use of all of these tools of statutory construction, the Court seeks a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 486.

The application of these principles to FCLAA compels the conclusion that Section 5(b) does not preempt Massachusetts' regulations. Section 5(b) provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). As the Court has previously held, "the pre-emptive scope of the [FCLAA] is governed entirely by the express language in § 5." *Cipollone*, 505 U.S. at 517.

In *Cipollone*, the Court acknowledged that Section 5(b) was "obviously broader" than the pre-emption provision of the 1965 act. *Id.* at 523. But after concluding that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law" claims, the Court recognized that that "does not mean that [Section 5(b)] pre-empts all common law claims." *Id.* at 521, 523. The Court then described the pre-emption inquiry in the following terms:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common-law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes *a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,"* giving that clause a fair but narrow reading. As discussed below, *each phrase within that clause limits the universe of common-law claims pre-empted by the statute.*

Id. at 523-24 (emphasis added).

Relying principally on the Second Circuit's decision in *Greater New York Metro. Food Council v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000), the court of appeals held that Section 5(b) does not preempt Massachusetts' regulations. The court reasoned that the State's regulations impose "location restrictions" analogous to zoning restrictions, which "do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress" and do not "present the kind of 'diverse, nonuniform, and confusing' advertising standards with which Congress was concerned when it enacted the FCLAA." Pet. App. 12a-13a (quoting 15 U.S.C. § 1331).

Petitioners criticize the court of appeals' construction of the phrase "with respect to . . . advertising" as irreconcilable "with the statutory text," Pet. Lorillard Br. 15, accusing the court of "liberat[ing] itself from the confines of the text," *id.* at 17, and of "effectively rewrit[ing] the statute, adding terms that Congress did not see fit to include." *Id.* at 19. Petitioners, however, are guilty of similar, if not the same, sins. Indeed, even if petitioners are correct in their contention that the First Circuit erred in its construction of this statutory phrase, Section 5(b) still does not preempt the State's regulations. To paraphrase *Cipollone,* "each phrase within [Section 5(b)] limits the universe of [state law] pre-empted by the statute." 505 U.S. at 524.

The relevant phrase of Section 5(b), which precludes preemption in this case, is the limitation that a state requirement or prohibition "be based on smoking and health." 15 U.S.C. § 1334(b). While petitioners assert that the State's location restrictions are "based on smoking and health," Pet. Lorillard Br. 14 (citing Pet. App. 13a n.6), they offer no explanation as to what this critical phrase means. Their failure is fatal, because Massachusetts' regulations applicable to cigarettes make no reference to "smoking and health." To the contrary, the regulations expressly declare that their purpose "is to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold, and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." 940 CMR § 21.01 (reprinted at Pet. App. 105a). The substantive provisions of the regulations likewise make no reference to health concerns. *See id.* §§ 21.02 - 07 as amended (reprinted at Pet. App. 105a-114a).

The unstated premise of petitioners' position is that *any* regulation of cigarette advertising—even if directed at illegal consumption—which has the purpose of reducing consumption, is "based on smoking and health" and is thus preempted. Construing section 5(b) at this level of generality would,

however, lead to numerous absurd results. Most sports stadiums and arenas are owned by state and local authorities. Under petitioners' construction, a State or local government would be prevented from prohibiting cigarette advertising within its facility. Moreover, the state and local entities that operate airports, train and bus stations, subways, trolleys and bus lines, would be prohibited from banning cigarette advertising therein. *See, e.g.*, Utah Code § 76-10-102 (2001).

It is no answer to suggest that these examples are "counterfactual" because they were covered by the Master Settlement Agreement (MSA) and consent decree. *See* Pet. Lorillard Br. 23 (describing as "counterfactual" the court of appeals' hypothetical that petitioners' construction of section 5(b) "could lead to the conclusion that 'states [are] without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard,'" Pet. App. 10a (citation omitted), because petitioners have agreed to refrain from "'target[ing] Youth.'") (other citation omitted)).[2] That

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[2] It is unclear why petitioners' acceding to an injunction to refrain from targeting minors renders a prohibition on providing free samples to minors "counterfactual." By its terms the injunction applies only to "Participating Manufacturers in their corporate capacity." J.A. 273. The decree goes on to state that "[t]he remedies, penalties and sanctions that may be imposed . . . in connection with a violation of this Consent Decree and Final Judgment . . . only apply to the Participating Manufacturers, and shall not be imposed or assessed against any employee, officer, or director of any Participating Manufacturer, or against any other person or entity as a consequence of such violation. . . ." *Id.* at 274.

In contrast, the State's prohibition on the distribution of free samples applies not only to a "manufacturer," but also to a "distributor or retailer." 940 CMR § 21.04(1)(a). And the regulations state that the terms "distributor" and "retailer" include "any person" who engages in the defined activity. *Id.* § 21.03. The regulations thus prescribe conduct by a far greater universe of entities and individuals than petitioners in their corporate capacity. While petitioners may faithfully refrain from such conduct in the future, the terms of section 5(b) preempt a state "requirement or prohibition" without regard to the status of the party upon

petitioners agreed in the MSA—thirty years after the enactment of the FCLAA—to forgo certain practices in advertising and promoting cigarettes has no probative value in divining Congress' intent in enacting section 5(b).

Furthermore, cigarette manufacturing and marketing is a huge international business. While petitioners dominate the U.S. market, they are not the only companies engaged in the business. *See generally* DMG World Media, *World Tobacco Directory* 10 - 111; 116 - 128 (48th ed. 2000). Massachusetts could adopt its scheme to regulate those companies who have not signed the MSA, particularly those new entrants into the market, who have not previously engaged in the conduct which gave rise to the State's lawsuit and who are thus not encumbered with the monetary payments which petitioners have agreed to make and who would have additional funds to market their products. *See* Pet. Lorillard Br. 3. Indeed, petitioners themselves recognized the problem posed by non-participating manufacturers and negotiated in the MSA a provision limiting their financial obligations in the event of a loss of market share. *See* MSA art. IX(d)(1); Tobacco Control Resource Center, *The Multistate Master Settlement Agreement And The Future Of State And Local Tobacco Control: An Analysis of Selected Topics and Provisions of the Multistate Master Settlement Agreement of November 23, 1998* 32 (1999) (discussing MSA art. IX(d)).

As these examples demonstrate, petitioners' proposed reading of the statute would lead to absurd results. *See, e.g., United States v. X-Citement Video*, 513 U.S. 64, 69-70 (1994). Furthermore, petitioners' premise that any regulation of cigarette promotion enacted for the purpose of reducing

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whom it is imposed. 15 U.S.C. § 1334(b). The hypothetical is thus not a "straw man," Pet. Lorillard Br. 23, and the court of appeals was correct to recognize the potential consequences of adopting petitioners' interpretation of section 5(b).

smoking is *necessarily* "based on smoking and health," renders that phrase superfluous. *Cf. Hohn v. United States*, 524 U.S. 236, 249 (1998). Simply put, if Congress had intended to provide petitioners with the broad immunity from state regulation that they claim the statute provides, then Congress had no need to include the phrase "based on smoking and health" in Section 5(b). Congress could have simply provided that "No requirement or prohibition shall be imposed under State law with respect to the advertising or promotion of any cigarettes" labeled in conformity with the act. Congress, however, did not do so and the Court must "give effect, if possible, to every clause and word" of Section 5(b). *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotations and citations omitted).

As the *Cipollone* plurality recognized, the phrase "based on smoking and health" has no plain meaning. *See* 505 U.S. at 528-30 & nn. 26-27.[3] The Court must therefore go beyond the ambiguous text and construe it in light of the presumption against preemption of state authority and with " 'a fair understanding of *congressional* purpose.'" *Medtronic*, 518 U.S. at 486 (quoting *Cipollone*, 505 U.S. at 530 n.27).

Section 1331, FCLAA's statement of purpose, could not make it clearer that section 5(b) does not preempt Massachusetts' location restrictions. As the provision explains, Congress' purpose was:

> to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby . . . the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion

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[3] The three-way debate in *Cipollone* between the plurality and the two dissenting opinions centered on the level of generality to be used in construing the phrase "based on smoking and health." *See* 505 U.S. at 529 n.27. That debate reinforces the conclusion that the phrase has no plain meaning.

> of warning notices on each package of cigarettes and in each advertisement of cigarettes[.]

15 U.S.C. § 1331. To be sure, the *Cipollone* plurality described the FCLAA's purpose as "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514 (*quoted in* Pet. Lorillard Br. 21). But Section 1331(2)(B) clarifies that Congress' purpose was confined to protecting the tobacco industry not from all such regulations, but only those "cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2)(B). And Congress further stated that its purpose was to protect the "national economy . . . to the maximum extent consistent with this declared policy." *Id.* § 1331(2)(A) (emphasis added). The scope of Congress' purpose in enacting FCLAA conclusively establishes that Section 5(b) does not preempt Massachusetts' location restrictions.

Such location restrictions do not impose a "requirement or prohibition based on smoking and health," *id.* § 1334(b), as they plainly do not involve "advertising with respect to any relationship between smoking and health." *Id.* § 1331. The regulations do not require any statement in cigarette advertising "about any adverse health effects of cigarette smoking." *Id.* § 1331(1).[4] Nor do they prohibit petitioners from making any statement in cigarette advertising "with respect to any relationship between smoking and health." *Id.* § 1331(2)(B). Moreover, the regulations do not require the disclosure in advertising or promotion of health-related information such as a brand's yield of tar, nicotine, carbon monoxide, hydrogen cyanide, or nitrosamines, or even of the ingredients added in the manufacturing of a cigarette, many of which may be toxic or form carcinogens when subjected to

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[4] Such a requirement would be preempted by Section 5(a), 15 U.S.C. § 1334(a).

heat and burning. *See* U.S. Dept. of Health & Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* 178-82 (2000). Nor do the regulations prohibit the tobacco industry from touting their brands as "lights" or having "lowered tar & nicotine." *See Parade*, Mar. 11, 2001, at 3 (ad for Pall Mall Lights); *Vanity Fair*, Jan. 2001, at 179 (ad for Marlboro Lights).

Thus, contrary to petitioners' view, construing Section 5(b) to support a content/location distinction is consistent with giving the operative phrase, "based on smoking and health," a "fair but narrow reading." *Cipollone*, 505 U.S. at 524. Whatever the precise scope of Section 5(b) preemption is, the provision's ambiguous language cannot be read—especially in light of Congress' declaration of purpose and the presumption against preemption of the States' police powers, *see Packer*, 285 U.S. at 111—as providing a "clear and manifest" expression of Congress's intent to preempt Massachusetts' location restrictions. *Rice*, 331 U.S. at 230.

II. MASSACHUSETTS' REGULATION OF THE LOCATION OF TOBACCO ADVERTISING AND THE RETAIL PLACEMENT OF TOBACCO PRODUCTS DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners argue that notwithstanding *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) and its progeny, Massachusetts' regulations should be subject to strict scrutiny. *See, e.g.*, Pet. Lorillard Br. 26. The Court should reject this argument for two reasons. First, it would unduly limit the States' authority in a manner contrary to this Court's cases. Second, it it unnecessary in view of the recent amplification by the Court of the evidentiary burden a State must meet in order to regulate commercial speech.

A. The Fundamental Distinction Between The Strict Scrutiny Applied To Political Speech And The Marginally Lesser Protection Afforded To Commercial Speech Reflects Core Constitutional Values And Should Not Be Effaced

Petitioners contend that "[w]here the government engages in content-based regulation of commercial speech 'for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.' " Pet. Lorillard Br. 28 (quoting *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion)). According to petitioners, "the government has greater power to regulate the content of commercial speech only when it 'regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information.' " *Id.* at 29 (quoting *44 Liquormart*, 517 U.S. at 501 (plurality opinion)). Petitioners request that the Court "clarify that *Central Hudson*'s 'intermediate scrutiny' standard applies only when the government regulates advertising based on those particular commercial aspects of the speech that justify affording lesser constitutional protection to commercial speech in the first place." *Id.* at 34.

The Court should reject petitioners' entreaties to subject regulation of commercial speech, like regulation of political speech and public discourse, to strict scrutiny. The rationale for providing greater constitutional protection for political, as opposed to commercial, speech is clear: political speech is constitutionally more significant than commercial speech. *See Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 469-72 & nn. 13-14 (1997) (compelling political speech affects fundamental First Amendment values that are not implicated by compelling commercial messages to buy

particular products); Robert Post, *The Constitutional Status Of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 47-50 (2000). This is because these two types of speech serve different constitutional values. On the one hand, the First Amendment values political speech because it is part of the political process. On the other hand, the First Amendment values commercial speech because it provides information that may be relevant to participation in the political process.[5] *See* Post, 48 U.C.L.A. L. Rev. at 48-49.

It is well settled that the level of constitutional protection turns on the constitutional significance of the speech that is regulated.[6] *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (nude dancing "falls only within the outer ambit of the First Amendment's protection") (collecting cases). Thus, when speech does not involve participation in the political process but serves instead the function of providing commercial information, the *Central Hudson* test—a level of constitutional scrutiny only marginally lower than strict scrutiny, *see* pp. 20-23, *infra*—embodies an appropriate accommodation between the States' responsibility and power to promote public safety, morals,

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[5] The tobacco companies' arguments that the Court should apply strict scrutiny to the Massachusetts regulations because they are content-based and viewpoint-discriminatory ignore the fundamental distinction between the constitutional values served by political speech and commercial speech. *See* Pet. Lorillard Br. 26-38, 39-41. Although the Massachusetts regulations restrict advertisements promoting tobacco use and do not restrict advertisements discouraging tobacco use, there is no reason for the Commonwealth to undercut its own police power objectives by prohibiting private anti-smoking advertisements.

[6] For example, government interests in managing the speech of its employees do not change simply because the employee is addressing a matter of public as opposed to private concern, but "constitutional protections for employee speech do change, because speech about matters of public concern embodies a distinct and greater constitutional value." Post, 48 U.C.L.A. L. Rev. at 48 (citing *Connick v. Myers*, 461 U.S. 138, 145-54 (1983)).

and general welfare and the constitutionally protected right to engage in commercial speech. This marginally lower level of scrutiny is appropriate not only, as the tobacco companies and their *amici* concede, to accommodate the States' interests in preventing fraudulent and misleading communications. *See* Pet. Lorillard Br. 28-29. It is appropriate to accommodate other equally important interests, such as Massachusetts' interest in curtailing illegal underage tobacco use.

The core premise of petitioners' argument is that the Court's commercial speech doctrine exists solely to protect the efficiency and fairness of the market. *See id.* at 28-29. While protecting market efficiency may be a worthy goal that has been viewed approvingly by some members of the Court, "the First Amendment should no more be interpreted to incorporate Milton Friedman than the Fourteenth Amendment should be read to incorporate Herbert Spencer." Post, 48 U.C.L.A. L. Rev. at 45-46; *cf. College Sav. Bank v. Florida Prepaid Postsec. Ed. Exp. Bd.*, 527 U.S. 666, 691 (1999). Nor is the Court's commercial speech doctrine limited in the manner petitioners contend.

The Court has repeatedly upheld regulation of commercial speech when the State has asserted purposes other than protecting fairness in the bargaining process. *See, e.g., Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 624-35 (1995) (upholding ban on mail solicitation by attorney of accident victims). In *Florida Bar*, the Court upheld the regulation based on the State's assertion of a substantial interest in protecting victims' privacy and the bar's reputation. The Court expressly noted that it did not even consider the State's interest "in protecting people against undue influence and overreaching" as a basis for upholding the state laws as a valid regulation of commercial speech. *Id.* at 624 n.1.

In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 484-85 (1995), the Court noted that "the prevention of misleading statements of alcohol content need not be the exclusive government interest served by" a statute; "the Government

here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs." *Coors* thus supports the proposition that commercial speech can be regulated "for reasons unrelated to the preservation of a fair bargaining process." Pet. Lorillard Br. 28 (internal quotations and citations omitted). *See also Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (ban on commercial speech was supported by State's interest in "promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility").

In *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), the Court upheld Puerto Rico's ban on casino advertising targeted at the Commonwealth's residents, notwithstanding that it "concern[ed] a lawful activity and [was] not misleading or fraudulent." *Id.* at 340-41. The Court expressly recognized Puerto Rico's substantial interest in reducing gambling by its residents because "excessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety, and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Id.* at 341 (citation omitted). The law at issue in *Posadas* thus had nothing to do with protecting the fairness of the bargaining process. Rather, its stated purpose was to protect Commonwealth residents from the social and economic costs of the underlying commercial activity.[7]

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[7] In *Coors* the Court approvingly cited this portion of *Posadas* for the proposition that government can regulate commercial speech in order to

As the forgoing cases demonstrate, petitioners' contention that "intermediate scrutiny" should be limited to cases in which the government is regulating to protect the bargaining process is insupportable. It would require the overruling of numerous decisions recognizing that commercial speech can impose substantial social and economic costs and that the States have authority to reduce those costs by appropriate regulation of commercial speech. And while petitioners downplay the broader purposes of their request—disingenuously suggesting that the Court need only "clarify" its prior holdings—applying strict scrutiny to laws that regulate tobacco advertising could result in the invalidation of the Federal ban on broadcast advertising of cigarette products. *See* 15 U.S.C. § 1335. The Court should decline to open the gates of its commercial speech doctrine to petitioners' jurisprudential Trojan horse.

B. The "Real Harm" Component Of The *Central Hudson* Test Is An Effective Safeguard of Commercial Speech

The Court has "never accepted mere conjecture" by government "as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000) (when government regulates speech to protect children from exposure to indecent materials it "must present more than anecdote and supposition"). When regulating commercial speech, a state or local government must " 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield*, 507 U.S. at 770-71); *see also United States v.*

"protect[ ] the health, safety, and welfare of its citizens." 514 U.S. at 485 (citing *Posadas*, 478 U.S. at 341).

National Treasury Employees Union, 513 U.S. 454, 475 (1995) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (*Turner I*)).

This "real harm" standard is an essential and effective guarantee of free speech in both the commercial and non-commercial contexts. In both situations the "real harm" requirement ensures that the government is not at liberty to enact "bans [that] . . . serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech." *44 Liquormart*, 517 U.S. at 503 (plurality opinion) (quoting *Central Hudson*, 447 U.S. at 566 n.9).

In its commercial speech cases since *Edenfield*, the Court has consistently held that government cannot carry its burden of justifying a restriction on commercial speech "by mere speculation or conjecture." 507 U.S. at 770. *See also Greater New Orleans Broadcasting*, 527 U.S. at 188; *Coors*, 514 U.S. at 487; *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994); *see also 44 Liquormart*, 517 U.S. at 507 (plurality opinion).

In *Edenfield*, for example, the Court held that a state board's ban on in-person solicitation by certified public accountants violated the First Amendment where the only evidence of harm was an affidavit "contain[ing] nothing more than a series of conclusory statements." 507 U.S. at 771. Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985), the Court rejected a state's argument that a ban on illustrations in attorney advertisements could be justified by abstract claims that the public would be misled, manipulated, or confused. The Court found that "the State's arguments amount[ed] to little more than unsupported assertions," and that the State had failed to offer "any evidence or authority of any kind" to support its contentions. *Id.* at 648.

The "real harm" standard also played a critical role in two recent decisions addressing the "must-carry" provisions of a

federal cable TV statute. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*); *Turner I*, 512 U.S. 622. In *Turner I*, the Court held that the "must-carry" provisions were subject to intermediate scrutiny under the First Amendment. *Turner I*, 512 U.S. at 662. A plurality determined that the government must accordingly "demonstrate" that the harms that the statute recited were "real, not merely conjectural" and that the regulation would "in fact alleviate these harms in a direct and material way." *Id.* at 664.

After a remand to develop the record, a majority held that the must-carry provisions did not violate the First Amendment. *Turner II*, 520 U.S. at 185. All nine Justices agreed the federal government, under an intermediate standard of review, had a duty to demonstrate both that the must-carry provisions addressed a "real harm" and that the regulations would alleviate those harms in a material way. *Compare id.* at 195 ("[t]he expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way") *with id.* at 258 (O'Connor, J., dissenting) ("impossible to discern whether Congress was addressing a problem that is 'real, not merely conjectural,' and whether must-carry addresses the problem in a 'direct and material way' ") (*quoting Turner I*, 512 U.S. at 664 (plurality opinion)). The Court reiterated that careful review of the evidence was an essential predicate to the application of this standard. *See Turner II*, 520 U.S. at 196-221 (reviewing the evidence before Congress and the evidence developed at trial); *id.* at 236-52 (same) (O'Connor, J., dissenting).[8] *Accord NTEU*, 513 U.S. at 475.

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[8] The *Turner II* Court ultimately divided on the question whether Congress' determinations were supported by substantial evidence. This division was the result of a disagreement about the degree of deference to be accorded to Congress. On the one hand, the majority, recognizing that "courts must accord substantial deference to the predictive judgments of Congress," held that its "sole obligation is to assure that, in formulating its

As explained above, the requirement that a State "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is both "critical" to prevent pretextual government regulation and adequate to protect commercial speech. *See Greater New Orleans Broadcasting*, 527 U.S. at 188 (*quoting Edenfield*, 507 U.S. at 770-71; *Rubin*, 514 U.S. at 487 (internal quotation marks omitted)). At the same time, it preserves government's ability to regulate commercial speech when necessary in the public interest. The government's evidentiary obligation will, of course, vary from case to case. As the Court recently held, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 391.

C. Massachusetts' Regulations Will Alleviate The Substantial Harms Of Tobacco Use By Minors To A Material Degree And Are No More Restrictive Than This Court Permits

The court of appeals correctly recognized that the "critical" inquiry under *Central Hudson* is whether the government has " 'demonstrate[d] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' "

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judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 195 (internal quotation marks and citations omitted). On the other hand, four members of the Court, while recognizing that the Court "owe[s] deference to Congress' predictive judgments," argued that the Court has "an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences." *Id.* at 229 (O'Connor, J., dissenting). In their view, the majority had given too much deference to Congress. *Id.* at 258 (O'Connor, J., dissenting) (criticizing the majority opinion for "a willingness to substitute untested assumptions for evidence").

Pet. App. 19a (quoting *Greater New Orleans Broadcasting*, 527 U.S. at 188). Not only is it a crime in Massachusetts to sell tobacco to minors, Mass. Gen. Laws. ch. 270, § 6, the court below correctly found on a product-by-product basis (cigarettes, smokeless tobacco, and cigars) that tobacco use by minors is a real harm and that each of the Massachusetts regulations directly advances the State's interests in alleviating this harm. *Id.* at 20a-29a.[9]

As demonstrated by this Court's First Amendment jurisprudence in the analogous area of adult business regulation, Massachusetts reasonably relied on the FDA's findings in determining that tobacco use by children and adolescents is a real harm. *See generally City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986) ("The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."); *see also City of Erie*, 529 U.S. at 297 (plurality opinion) ('[e]ven in cases addressing regulations that strike close to the core of First Amendment values, [the Court] ha[s] accepted a state or local government's reasonable belief that the experience of other jurisdictions is

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[9] Special First Amendment considerations apply when a State seeks "to protect children who are not yet independently able to assess the value of the [commercial] message presented." *Annheuser-Busch v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."); *cf. Greater New Orleans Broadcasting*, 527 U.S. at 197 (Thomas, J., concurring) (government has less power to regulate commercial speech when "legal users" of a product are the target of the speech than when non-legal users are involved); *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) (regulation of commercial speech subject to higher scrutiny when government seeks to prevent "men and women" from "hearing facts that might not be good for them").

relevant to the problem it is addressing) (citing *Nixon*, 528 U.S. at 393 n.6).

In addition to the FDA's findings, the Massachusetts Attorney General had other "information to support his view that underage use of cigarettes, smokeless tobacco products, and cigars poses a real danger to the Commonwealth of Massachusetts." Pet. App. 21a; *see* J.A. 75 (FDA findings and other studies relied upon by the Attorney General). The additional evidence marshaled by the Massachusetts Attorney General offers more than adequate substantiation for the [Massachusetts] law. *See Nixon*, 528 U.S. at 393.

Just as the court of appeals correctly found that tobacco use by minors is a real harm, it also properly ruled that the Massachusetts advertising regulations "will 'directly advance' [the State's] goals of reducing both underage tobacco use and tobacco sales to minors." Pet. App. 28a. All three Massachusetts regulations reduce demand for tobacco products by minors and promote compliance with state law prohibiting tobacco sales to minors. *Id.* at 25a-29a.

The propositions that advertising promotes consumption and that restrictions on advertising will reduce consumption are "neither novel nor implausible." *Nixon*, 528 U.S. at 391. Given the Court's determination in *Nixon* that Missouri was entitled to rely on the common sense proposition that large campaign contributions cause corruption or the appearance of corruption, *see id.* at 395, the court below correctly held that Massachusetts could rely on the common sense propositions that tobacco advertising increases consumption by minors and that restrictions will reduce illegal sales to minors. Pet. App. 25a-29a. *Cf. City of Erie*, 529 U.S. at 300-01 ("it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing . . . a ban on such nude dancing would further [the city's] interest in preventing such secondary effects") (plurality opinion).

Massachusetts did not merely rely on common sense, however. As the court of appeals found, the Commonwealth "cite[d] myriad sources to support [the] proposition that tobacco advertising and tobacco use are causally related." Pet. App. 26a. Just as Missouri could rely on federal statutes and congressional findings to justify state campaign finance regulations, *Nixon*, 528 U.S. at 393, Massachusetts can rely on a federal statute prohibiting television and radio advertising of tobacco and the underlying premise that this complete prohibition of certain types of advertising will reduce consumption. *See* 15 U.S.C. §§ 1335, 4402(f) (prohibiting advertising of cigarettes, little cigars, and smokeless tobacco "on any medium of electronic communication" subject to regulation by FCC). Massachusetts, moreover, correctly relied on the FDA's express "finding that advertising plays a material role in the decision by those under 18 to use tobacco products." Pet. App. 27a (citing 60 Fed. Reg. 44466 (1996)). Thus, the Commonwealth carried its "burden of demonstrating that the restrictions will alleviate the harm caused by underage smoking to a material degree." *Id.*

The tobacco companies nonetheless claim that advertising restrictions will not directly advance the Commonwealth's interest in reducing underage tobacco use because there is no proof that the restrictions will in fact work. Pet. Lorillard Br. 43 ("[n]o study or any other evidentiary support demonstrates" that the Massachusetts regulations "will achieve an additional 'significant reduction' in underage smoking" beyond the reduction attributable to new restrictions imposed under the Master Settlement Agreement) (citation omitted); *see also id.* at 42-44. Similarly, they claim that the advertising restrictions violate the First Amendment because there are allegedly "numerous 'practical and non speech-related forms of regulation' that 'could more directly and effectively' accomplish the professed goal of reducing underage smoking." *Id.* at 45 (citation omitted).

The Court should reject petitioners' invitation to impose an insuperable empirical "evidentiary obligation" on Massachusetts. *See Nixon*, 528 U.S. at 393. Even granting the tobacco companies' assumption that the advertising restrictions in the MSA will have some effect in reducing tobacco use by minors—an assumption that runs counter to the tobacco companies' argument that there is no connection between advertising and consumption, *see* Pet. Lorillard Br. 43—Massachusetts still has a substantial governmental interest in curbing tobacco use by minors. The tobacco companies, however, would put the Commonwealth to the impossible task of proving in advance the incremental reduction in tobacco use by minors that would be attributable to its advertising restrictions.

The tobacco companies also contend that Massachusetts—before imposing any advertising restrictions—must exhaust all imaginable alternatives, such as laws licensing tobacco retailers or punishing minors for purchasing tobacco, and more vigorous enforcement of existing laws prohibiting the sale of tobacco to minors and prohibiting smoking on school grounds. *See id.* at 45. The tobacco companies, in short, would require the Commonwealth to experiment with other regulations in order to prove empirically—at immense cost to the youth of Massachusetts and extensive commercial benefit to petitioners—that the Attorney General's regulations were the least restrictive means of curbing illegal underage tobacco sales and use. Such proof is not required by this Court's commercial speech doctrine. *See Fox*, 492 U.S. at 477 (commercial speech need not be regulated by the "least restrictive means").

Petitioners' contention that Massachusetts' regulations violate the First Amendment is thus unpersuasive. The court of appeals required Massachusetts to supply at least as much empirical evidence to support its regulation of the placement of tobacco advertising as this Court required from Missouri to

justify its campaign finance regulations. *See Nixon*, 528 U.S. at 393. The First Amendment does not impose greater evidentiary burdens on a State that seeks to regulate the placement of tobacco ads and tobacco products than it does on a State that seeks to regulate political speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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v.

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ATTORNEY GENERAL OF MASSACHUSETTS,
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ALTADIS U.S.A. INC., *et al.*,
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BRIEF FOR THE CITIES OF OAKLAND, CALIFORNIA, AND CHICAGO, ILLINOIS, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE CITIES OF OAKLAND, CALIFORNIA, AND CHICAGO, ILLINOIS, AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE CITIES OF OAKLAND AND CHICAGO [1]

The City of Oakland, California ("Oakland"), is defendant in *Eller Media Co. v. City of Oakland*, No. CV-98-02237 WHA (N.D. Cal.), *appeals pending*, Nos. 01-15210, 01-

---

[1] The Cities of Oakland and Chicago submit this brief, through their authorized law officers, pursuant to Rule 37.4.

15354 (9th Cir.), a billboard industry challenge to Oakland's ordinance that restricts outdoor alcohol and tobacco sign advertising near where minors live, go to school, and play. The *Eller Media* plaintiffs challenged the Oakland ordinance's application to alcohol, but not tobacco, advertising. After thirty months of litigation, the district court granted summary judgment for Oakland on December 7, 2000. (The opinion is attached in an appendix bound with this brief, cited as "_a.") The plaintiffs' motions for relief from judgment and appeals to the Ninth Circuit are pending.

The City of Chicago, Illinois ("Chicago"), is defendant in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000), a billboard industry challenge to Chicago's ordinance that restricts outdoor alcohol and tobacco sign advertising near where minors live, go to school, and play. The Seventh Circuit reversed the district court's ruling that the ordinance was preempted by federal law, and the parties are now preparing for trial on the plaintiffs' First Amendment claims.

SUMMARY OF ARGUMENT

If there is one principle of commercial speech that this Court has unanimously and repeatedly reaffirmed, it is that the First Amendment provides no protection for commercial speech that advertises an illegal product. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 183 (1999); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). It is a crime in Massachusetts to sell or give tobacco to minors. *See* Mass. Gen. L., ch. 270, § 6. Accordingly, Massachusetts' regulation of advertisements that induce minors to participate in illegal tobacco transactions would warrant no First Amendment scrutiny whatsoever, but for the fact that the regulations also have an incidental effect on tobacco advertising to adults.

While *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), does not explicitly address the context of restrictions on commercial speech for products that are illegal for some purchasers but not for others, this case can be decided based on established and uncontroversial principles, without resolving the *Central Hudson* test's continuing vitality. Massachusetts' regulations reasonably target a serious and widespread problem of illegal youth tobacco sales, without depriving adults of sufficient opportunities to learn about tobacco products. Any incidental burden these regulations might impose on tobacco advertising to adults is proportional to the state's compelling goal of preventing illegal tobacco sales to children, who are too young to make mature decisions about whether to use that dangerous and addictive product. Massachusetts' regulations thus have a "reasonable fit" to the state's compelling goal of preventing illegal tobacco sales to minors, *see Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989), and are, for this reason, constitutional.

The government's power to restrict commercial speech that promotes unlawful activity does not simply disappear whenever such restrictions incidentally affect commercial speech directed toward lawful consumers. This Court has long held that the First Amendment permits "prophylactic" regulation of commercial speech in "circumstances likely to pose dangers that the State has a right to prevent," *see, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449, 464 (1978). One of the most serious of these dangers is the solicitation of crime, and the government's prophylactic power should be at its peak when it is exercised to prevent illegal behavior. The government is not rendered impotent to restrict commercial speech that promotes crime simply because such restrictions might have an impact on advertisements to lawful consumers. *Cf. United States v. Edge Broadcasting*, 509 U.S. 418, 434-35 (1993).

This is not to say that a state could constitutionally prohibit advertising for every product that is illegal to minors, simply because it is illegal to minors, without regard to the burden on adults. The government may neither leave lawful consumers in the dark, nor regulate advertising addressed to illegal users as a pretext for the suppression of commercial speech directed at those to whom the product may lawfully be sold. But no infringement of First Amendment values results where a regulation of commercial speech is justified by the need to prevent the illegal sale to minors of a dangerous, addictive product that has a history of being tacitly marketed to youth, so long as the regulation leaves adults sufficient means to learn about the product. The government's interests here are far stronger than those which justified restrictions on the broadcast of the seven "filthy words." *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978).

By prohibiting tobacco ads in geographical areas where minors spend most of their time, in a medium particularly accessible to children, Massachusetts has targeted advertisements that encourage youth to buy tobacco. There is no better way—petitioners certainly have suggested none—to target and regulate such ads. Massachusetts' tobacco advertising regulations leave open to tobacco advertisers numerous, traditionally-significant media, some of which are not particularly expensive, including newspapers, magazines, handbills, the mail, and, of course, any sign more than three blocks from a school or playground. The regulations also permit tobacco companies to voice their views on any issue—whether it be the tobacco tax or the health effects of smoking—as often as they like, so long as they do not do so through commercial speech. In short, Massachusetts' regulations neither "impede debate over central issues of public policy," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (Stevens, J.), nor "reduce the adult population . . . to reading only what is fit for

children," *Butler v. Michigan*, 352 U.S. 380, 383 (1957). They simply make it more difficult for tobacco companies to hawk their wares where children go to school and play and through a medium that evades parental control.

Once it is recognized that the sale of tobacco to minors is a crime, and that tobacco signs near schools and playgrounds directly relate to that crime, the fallacies in petitioners' call for strict scrutiny become plain. While Massachusetts' regulations are indisputably content based, so too are all regulations of commercial speech, including those aimed at false and misleading advertising. Massachusetts' regulations are justified by the state's unquestionable power to "freely regulate commercial speech that concerns unlawful activity," *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995), an unprotected content-based subcategory of commercial speech, as well as the state's "well settled" power to "adopt more stringent controls on communicative materials available to youths than on those available to adults," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). As Justice Stevens has written, "[a] picture which may appropriately be included in an instruction book may be excluded from a billboard." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 717 (1977) (Stevens, J., concurring).

Massachusetts has enacted a reasonably targeted advertising regulation to prevent implicit invitations to minors to participate in a crime, and that regulation does not deprive lawful adult consumers of sufficient means of learning about tobacco products. Under established principles of First Amendment jurisprudence, this is sufficient to sustain the constitutionality of the regulation.

ARGUMENT

I. The First Amendment Permits the Government to Prohibit Commercial Advertisements of a Product to Persons for Whom that Product Is Illegal, So Long as the Regulation Has a Reasonable Fit to Preventing Illegal Transactions.

The First Amendment would plainly permit the state to prohibit a commercial billboard facing a middle school that carries the message: "*Hey kids*, buy Camel to be cool and sexy." *See, e.g.*, *Pittsburgh Press*, 413 U.S. at 388. The question presented in this case is whether the state is disabled from regulating such signs if the italicized words, "*Hey kids*," are not made explicit.

Although *Central Hudson* does not explicitly address the situation where a product such as tobacco or alcohol is illegal for some purchasers, but not for others, this case can be decided based on established and uncontroversial principles, without resolving the continuing vitality of the *Central Hudson* test. This Court extended a limited form of First Amendment protection to commercial speech principally to protect lawful consumers' interest in commercial information. This interest does not apply where advertising is addressed to illegal purchasers, particularly when these purchasers are children. When a commercial speech restriction has a "reasonable fit" to preventing a serious problem of illegal sales to minors—by targeting commercial speech most likely to influence children to make an illegal purchase, without leaving lawful adults in the dark about their commercial options—it is constitutional.[2]

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[2] Although we argue in this brief that commercial speech regulations designed to prevent illegal sales to minors are constitutional if they have a "reasonable fit" to that goal, we wish to make clear that *amici* agree with the position of *amici* City of Los Angeles, *et al.*, that Massachusetts' regulations also satisfy each element of the Central Hudson inquiry and are not preempted.

A. The First Amendment Does Not Protect Commercial Speech that Advertises or Promotes Illegal Activity.

Commercial speech "occurs in an area traditionally subject to governmental regulation," and as this Court has said, "the state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456. Nevertheless, in a series of cases beginning with *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court extended to commercial speech a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik*, 436 U.S. at 456. The Court took that step largely to protect "consumer's interest in the free flow of commercial information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976). Thus, "'[t]he entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression *about* goods and services and the right of the government to regulate the sales *of* such goods and services.' " *44 Liquormart*, 517 U.S. at 499 (plurality) (quoting Tribe, *American Constitutional Law* § 12-15, at 903 (2d ed. 1988)).

Certain types of advertising, including that "related to illegal behavior," have received no constitutional protection at all. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983); *Central Hudson*, 447 U.S. at 563-64. Ever since the Court first directly confronted the question, *see Pittsburgh Press*, 413 U.S. at 388, it has repeatedly and without hesitation reaffirmed that the government "may freely regulate commercial speech that concerns unlawful activity." *Florida Bar*, 515 U.S. at 623-24; *accord Greater New Orleans*, 527 U.S. at 183; *Virginia Board*, 425 U.S. at 772. Even those members of the Court who have sometimes raised doubts about the broadest applications of the commercial

speech doctrine have agreed on this point. *See 44 Liquormart*, 517 U.S. at 497 n.7 (opinion of Stevens, J.); *id.* at 520, 518 (Thomas, J., concurring); *Fox*, 492 U.S. at 475 (majority opinion of Scalia, J.).

Where commercial speech promotes illegal activity, the government's "interest in regulating the underlying transaction," *Edenfield*, 507 U.S. at 767, is at its height. Moreover, none of the usual reasons for protecting commercial speech apply to solicitations to unlawful purchasers. A consumer has no cognizable competing interest "in the free flow of commercial information" about "who is charging what," *Virginia Board*, 425 U.S. at 763, 764, when the consumer may not lawfully buy the product. *See Central Hudson*, 447 U.S. at 563. Nor is there a "public interest" that purchases of illegal goods, "in the aggregate, be intelligent and well informed." *Virginia Board*, 425 U.S. at 765. Bans on advertising related to illegal activity do not endanger deeper, democratic values by "obscur[ing] an 'underlying governmental policy,' " *44 Liquormart*, 517 U.S. at 503, for the government's policy is plain on the face of the criminal code. And whatever incremental contribution to public debate may be made by *commercial* speech for such products as marijuana or "cop killer" bullets, it is more than outweighed by the government's compelling interest in preventing a flourishing, unlawful trade in prohibited goods.[3]

---

[3] The Attorney General has, throughout this litigation, argued that tobacco sales to minors are illegal. *See Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180, 186 (D. Mass. 2000); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 43, 51 (1st Cir. 2000). While that illegality may not end the inquiry under *Central Hudson*'s first prong, the Attorney General has always contended that it informs the constitutional analysis.

B. A Regulation of Commercial Speech Has a "Reasonable Fit" to the Prevention of Illegal Transactions If It Addresses a Serious Problem of Illegal Sales to Minors and Leaves Open Sufficient Channels By Which Adult Consumers Can Learn About the Product

Petitioners and their *amici* cursorily dismiss the fact that the sale of tobacco to minors is a crime on the ground that the sale of tobacco to adults is not. The mere fact that a product is lawful for some users, however, cannot deprive the government of all power to restrict marketing to illegal purchasers. Instead, what is called for is "a constitutionally appropriate balance," *see Bolger*, 463 U.S. at 84 (Stevens, J., concurring) (internal quote marks omitted), a balance that both acknowledges the government's compelling need to prevent crime and that simultaneously protects lawful purchasers' interests in information about goods and services.

1. It has always been understood that a regulation of commercial speech may be overbroad to a degree that would be intolerable if applied to noncommercial expression. *Compare Ohralik*, 436 U.S. at 467-68, *with In re Primus*, 436 U.S. 412, 421-22, 428-32 (1978). Thus, in "circumstances likely to pose dangers that the State has a right to prevent," the government may establish and enforce "prophylactic" regulations of commercial speech "whose objective is the prevention of harm before it occurs." *Ohralik*, 436 U.S. at 449, 464; *see also In re R.M.J.*, 455 U.S. 191, 203 (1982). The government may ban in-person attorney solicitations to prevent overreaching, even absent evidence that every instance of in-person solicitation in fact overreaches. *See Ohralik*, 436 U.S. at 466, 468. The government may require attorneys who take a case on contingency to disclose clients' liability for costs, even though not all clients would be misled without the disclosure. *Zauderer v. Office of Disciplinary*

Counsel, 471 U.S. 626 (1985). The government may prohibit all on-campus commercial sales pitches to "prevent[] commercial exploitation of students," *Fox*, 492 U.S. at 475, even though not all on-campus sales will inflict such harms. And the government may ban off-site commercial billboard advertisements as traffic hazards, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981), even though some such ads might pose no such hazard.

Thus, so long as the overbreadth of a regulation of commercial speech is "in proportion to the interests served," this Court has "le[ft] it to governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480 (internal quote marks omitted). The Court has not required that the regulation of commercial speech be the least restrictive possible; instead, it has upheld such regulation when it evidences a "reasonable fit" between "the legislature's ends and the means chosen to accomplish those ends." *Id; accord*, *Greater New Orleans*, 527 U.S. at 188; 44 *Liquormart*, 517 U.S. at 507-08 (plurality); *id.* at 529 (O'Connor, J., concurring); *Florida Bar*, 515 U.S. at 632; *Rubin v. Coors*, 514 U.S. 476, 486 (1995).

The permissible scope of such prophylactic regulation is necessarily at its broadest when the government acts to restrict commercial speech "related to illegal behavior," *see Bolger*, 463 U.S. at 69, for in such circumstances the underlying harm the state seeks to prevent is most grave. The danger is that an act deemed serious enough to warrant criminal sanction may result. Thus, as a general rule, "the government may freely regulate commercial speech that concerns unlawful activity." *Florida Bar*, 515 U.S. at 623-24.

Where commercial speech relates to activity that is only *sometimes* unlawful—where, for example, advertisements can reach both lawful and unlawful purchasers—it will frequently prove impossible, in practice, to distinguish with precision

which ads do and do not induce illegal sales. Yet it is precisely because of such uncertainties that commercial speech doctrine has always permitted the government to enact prophylactic restrictions where the commercial speech is "likely" to pose dangers that justify its restriction. *Ohralik*, 436 U.S. at 449. It is not only appropriate in such circumstances, but essential, for the government to make what the Court has termed a "rough approximation of efficacy," *see Greater New Orleans*, 527 U.S. at 194-95, by regulating the location, hours, or style of advertisements to restrict only those instances most likely to induce illegal sales. The government should be able to proscribe an advertisement for nerve gas in *Soldier of Fortune* magazine, for example, even if the mailing of such an offer to a military procurement officer is allowed. And the government may prohibit lottery advertisements from being broadcast from jurisdictions where the lottery is illegal, even though it thereby burdens listeners who live where the lottery is legal. *See Edge Broadcasting*, 509 U.S. at 423. While the government may not "burden substantially more speech than is necessary to further [its] legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), "[s]o long as the chosen means are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800; *cf. Fox*, 492 U.S. at 478 (holding that the time, place and manner doctrine sets a ceiling for First Amendment scrutiny of commercial speech regulation).

This is the only approach that will neither cut off the flow of commercial information to lawful purchasers nor invite advertisers implicitly to solicit criminal transactions by placing ads where they are most likely to induce illegal sales. *Fox*'s "reasonable fit" test is a manifestly appropriate measure of the government's authority to steer a middle

course between these extremes. Whatever concerns may exist about this Court's commercial speech doctrine as applied to "truthful information about *entirely lawful* activity," *Virginia Board*, 425 U.S. at 773 (emphasis added), the government must be permitted adequate leeway to prevent illegal transactions, and to prevent commercial speech that induces them.

2. Where the government acts to prevent transactions that are not only illegal, but also involve minors in that illegality, its prophylactic power over commercial speech is necessarily at its peak. The government's interest in preventing harm to minors is compelling, *see, e.g.*, *Sable Communications v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989), for minors are unusually vulnerable and unusually susceptible to marketers' influence. As Justice Stewart wrote in his concurrence in *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968):

> The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas." . . . The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.
>
> When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. . . . ¶ I think a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

Thus, where advertising for a product illegal to minors is restricted only in places where minors spend most of their

time, those restrictions are firmly supported by "society's right to 'adopt more stringent controls on communicative materials available to youths than on those available to adults.' " *Pacifica*, 438 U.S. at 757 (Powell, J. concurring).

This Court has not, contrary to the claim of *amicus* Association of National Advertisers ("ANA"), consistently rejected society's right to protect children from speech that is particularly dangerous for them. *Compare* ANA Br. at 9. Not one of the cases cited by the ANA stands for such a proposition. Most involved restrictions on *non*commercial speech, and none involved limitations as narrow as those challenged here.[4] Only in *Bolger* did the Court confront a restriction on commercial speech, and the law held unconstitutional there "purg[ed] all mailboxes" of any advertisements for contraceptives, a product that was not only entirely legal for minors, but constitutionally protected. 463 U.S. at 73-75.

These cases hardly hold that the government may never regulate advertising to minors in a way that imposes incidental burdens on adults, and several of these cases suggest precisely the opposite. *See, e.g.*, *Sable*, 492 U.S. at 126 (government may enact narrowly drawn regulation on *non*commercial speech to protect "the physical and psychological well-being of minors"); *Joseph Burstyn*, 343

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[4] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 498 (1952), for example, invalidated a law that banned any film the state viewed as "sacrilegious." *Butler* struck down a law that banned all books, magazines, newspapers, writings, ballads, pictures, drawings, pamphlets, publications, recordings, photographs, and "other thing[s]" considered by the state as "tending to the corruption of the morals of youth." 352 U.S. at 381. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 869, 879 (1997), rejected a ban on transmission of any indecent communications over the Internet, in part because substantially less restrictive alternatives were available. And *Sable*, 492 U.S. at 128, 130-31, invalidated a ban on all indecent "dial-a-porn," again because less-restrictive alternatives were available.

U.S. at 502 (a movie's "capacity for evil, particularly among youth" may be "relevant in determining the permissible scope of community control"); *Reno*, 521 U.S. at 875 ("the governmental interest in protecting children from harmful materials" cannot justify "an *unnecessarily broad* suppression" of *non* commercial speech to adults (emphasis added)). Indeed, when the Court has felt the well-being of children to be unambiguously at stake, as with child pornography, it has not hesitated to approve regulations of speech that had quite wide-ranging impact on communications available to adults. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982).

3. If regulations of commercial speech for a product that is illegal to some but not to others evince a "reasonable fit" to preventing illegal transactions, there is little danger to legitimate commercial speech. There can be no "reasonable fit" unless the danger of illegal transactions is in fact real; for in the absence of a real problem, the burden on speech to lawful consumers could not be justified. *See Fox*, 492 U.S. at 480 (burden on commercial speech must be "'in proportion to the interest served'" (quoting *In re R.M.J.*, 455 U.S. at 203)). The "reasonable fit" inquiry therefore does not permit the government to use an illusory danger of illegality as a pretext for pursuing "'an underlying governmental policy' that could be implemented without regulating speech." *44 Liquormart*, 517 U.S. at 501 (Stevens, J.). The question in each case is whether an "actual problem" exists. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, __, 120 S. Ct. 1878, 1891 (2000). This Court has adequate doctrinal tools to make such determinations. *Compare Ohralik*, 436 U.S. at 464-68 (in-person solicitation by attorney sufficiently dangerous to support regulation) *with Edenfield*, 507 U.S. at 774-75 (in-person solicitation by accountant not demonstrated to be a real problem).

If the underlying unlawful problem is not only "actual," but epidemic, the legislature's determination to restrict commercial solicitations to illegal users should be given corresponding weight. This Court has been prepared to accept quite drastic restrictions on commercial advertising where the underlying governmental purpose was sufficiently important. In *Metromedia*, 453 U.S. at 508, for example, the Court upheld a total ban on all off-site commercial billboards based on the city's interests in preventing traffic hazards and unsightly obtrusions. The government's interest in preventing *illegal* sales to *minors* of harmful and addictive products such as tobacco and alcohol is of far greater magnitude. That interest, when backed by substantial evidence of widespread illegal sales and associated societal ills, justifies a commensurate burden on commercial advertising to adults.

4. This Court has long reviewed with "special care" restrictions that "entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson*, 447 U.S. at 566 n.9. As Justice Stevens has noted, "complete speech bans . . . all but foreclose alternative means of disseminating certain information." 517 U.S. at 501 (Stevens, J.). Such complete bans can deny lawful consumers important information about goods and services necessary to informed economic decision making.

Restrictions on commercial speech that allow ample alternative channels of communication do not raise these concerns. There are in fact a vast array of methods by which marketers can promote their commercial messages. Advertisers can reach lawful consumers without bombarding them through all media, in all places, at all times. Commercial sign advertising represents only one of numerous avenues of communication, so much so that this Court has countenanced a complete ban on off-site commercial billboards. *See Metromedia*, 453 U.S. at 508-12. In evaluating the constitutionality of restrictions on commercial speech, this Court has frequently taken into account the

sufficiency of remaining channels of communication when evaluating the reasonableness of the government's restriction. *Compare Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977) (noting the unique role played by residential "for sale" signs in the real estate market, in which "reality is not marketed through leaflets, sound trucks, demonstrations, or the like. . . .") *with Florida Bar*, 515 U.S. at 633-34 (personal injury victims have adequate means to learn about lawyers even if lawyers are not permitted to solicit them by mail in the immediate aftermath of their accidents). It is clear that burdens on commercial speech can be constitutional if lawful consumers retain adequate access to information about the relevant product or service, *see, e.g.*, *Ohralik*, 436 U.S. at 458, for in such circumstances, the First Amendment's interest in the "free flow of commercial information" is vindicated, *Virginia Board*, 425 U.S. at 763.

Where the burden on commercial speech to lawful consumers is an incident to restrictions on commercial advertising that encourages illegal transactions, the strength of the government's justification supports a degree of restriction that might not be permitted in other circumstances. Certainly if sound trucks are not an essential medium for political expression because "[t]here is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers," *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949), then the same must be true where the government carefully targets restrictions only on one form of commercial promotion for a product that is illegal for a sizeable proportion of the audience, and only in locations especially likely to induce unlawful sales.

C. Restrictions on Commercial Speech Targeted to Advertising that Promotes Illegal Transactions Need Not Be Content Neutral.

While it might be said that a regulation of commercial speech to unlawful purchasers is content based, the same

could be said of all regulations of commercial speech. The entire category of commercial speech consists largely of speech that, in one way or another, "propose[s] a commercial transaction." *Virginia Board*, 425 U.S. at 762. Moreover, most commercial speech regulations—including those which prohibit false and misleading advertising—make further content-based distinctions within that category. Yet this has never been thought to require commercial speech regulations to survive strict scrutiny.

From the time this Court first extended limited First Amendment protection to commercial speech, it understood that it was creating a content-based doctrine. *See, e.g.*, *Virginia Board*, 425 U.S. at 761 ("If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content."); *Bolger*, 463 U.S. at 65 ("By contrast, regulation of commercial speech based on content is less problematic."). The Court has repeatedly upheld facially content-based restrictions of commercial speech without applying strict scrutiny, including a prohibition on employment ads listed under gender-specific headings, *see Pittsburgh Press*, 413 U.S. at 388-89; restrictions on unsolicited mailings by lawyers to personal injury victims in the immediate aftermath of an accident, *see Florida Bar*, 515 U.S. at 634-35; contingency-fee disclosure requirements, *see Zauderer*, 471 U.S. at 652-53; and a prohibition on off-site commercial billboard advertising, *see Metromedia*, 453 U.S. at 508-12.

To say that content-based distinctions may play no role in the government's regulation of commercial speech would be to say that the most common forms of restrictions on commercial speech would be required to survive the strictest test this Court applies. That is, as this Court has recognized, a very slippery path. "[R]equir[ing] a parity of constitutional protection" between advertisements that promote an illegal transaction and noncommercial speech, including political, scientific, and artistic expression, would surely bring us

closer to "dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Ohralik*, 436 U.S. at 456; *accord Florida Bar*, 515 U.S. at 623; *Fox*, 492 U.S. at 481 (1989); *Central Hudson*, 447 U.S. at 562 n.5. It is in part for this reason that it would be "incompatible" with the "'subordinate position [of commercial speech] in the scale of First Amendment values' to apply a more rigid standard" to regulations of such speech than to content-neutral restrictions on the time, place and manner of noncommercial speech. *Fox*, 492 U.S. at 478 (alteration in original). Whatever else might be said of the Court's commercial speech doctrine, this insight is certainly apt where the government seeks to restrict commercial advertising that induces a serious problem of illegal sales to minors.

Even petitioners and their *amici* do not advocate strict scrutiny for all content-based restrictions on commercial speech. They accept that *certain* content—commercial speech that is misleading, for example—must be regulable. *See, e.g.*, Pet. Br. 30, No. 00-596. But if commercial speech of misleading content does not warrant strict scrutiny, then commercial speech that promotes criminal transactions involving children certainly does not either.

The government should not be thought to commit impermissible content or viewpoint discrimination if it prohibits billboards advertising anabolic steroids one block from the high school gym. True, there may be *some* legal uses for even Schedule III drugs. *Cf.* 21 U.S.C. §§ 812(c), 823(e). But where the government regulates the location or medium of commercial speech in a reasonably targeted effort to preclude those ads that are most likely to induce sales to unlawful purchasers, the government's purpose and method are fully consonant with First Amendment values.

II. Massachusetts' Regulations Have A Reasonable Fit to the Compelling Goal of Preventing a Serious Problem of Illegal Underage Tobacco Sales and Use.

Massachusetts' tobacco advertising regulations reasonably target an epidemic of illegal underage tobacco sales and use that could not be combated as effectively if tobacco ads near schools and playgrounds were permitted without any restraint. This is not a case in which adults have been left in the dark about tobacco products. Because the incidental burden imposed on tobacco advertising to adults is entirely reasonable in light of the state's compelling purpose, the state's regulations are constitutional.

1. Massachusetts' regulations principally target a medium—advertising signs near schools and playgrounds—that is even more intrusive to children than radio or television broadcasts. Such signs stare implacably at children, and parents cannot turn the signs off. As Justice Brandeis stated almost seventy years ago in upholding Utah's tobacco sign advertising restriction:

> Billboards, street car signs, and placards and such are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisements. The radio can be turned off, but not so the billboard or streetcar placard.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932); *compare Reno*, 521 U.S. at 869 (because Internet speech generally only

reaches persons who take steps to find it, it is less invasive than speech that reaches persons uninvited).

Justice Brandeis' observations of seven decades ago have stood the tests of time and technology. To this day, there remains no mechanism selectively to block or scramble children's view of outdoor signs. *Compare Playboy Entertainment Group*, 120 S. Ct. at 1887. Access cannot be restricted to those with a credit card or some other indicia of majority. *Compare Sable*, 492 U.S. at 128. Children cannot be separated from tobacco signs' solicitation through more vigorous parental "exercise [of] control over information that flows into their mailboxes." *Bolger*, 463 U.S. at 73.

Indeed, the sign advertising industry trumpets the medium's resistance to control. As the district court noted in *Eller Media v. City of Oakland*, "Outdoor advertising 'is seen all day, every day,' in Plaintiffs' words. 'It cannot be turned off like television, tuned out like radio or discarded like newspapers and magazines.'" *See infra*, at 14a (citations omitted); *see also id.* (quoting *amicus* Infinity Outdoor's statement that "[W]e are proud to say, yes, that billboards cannot be turned off, cannot be avoided . . . . Cannot be discarded like you can throw away a newspaper.").[5] Industry and other research the *Eller Media* court found persuasive reveals that:

> Minors pay especially close attention to billboards. Studies show that children's awareness of billboards is,

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[5] In a case like this, the Court may look to evidence developed by other jurisdictions, including that filed in *Eller Media* by the City of Oakland, in efforts to address similar problems. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000). It has never been necessary for one governmental body to duplicate research performed as to other, similarly situated jurisdictions. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-99 (2000).

> in the words of a billboard company analysis, "remarkable." "When compared to older viewers, the kids outscored adults in perception, remembrance and correct identification of outdoor advertised messages seen."

See id. (citations omitted). One of these studies found, for example, that boys and girls in San Jose, California, are about 200 percent more likely correctly to identify billboards for Olympia beer than are adults. Expert testimony in *Eller Media* also documented that alcohol advertising begins to influence children who are as young as age six. Children of such tender years are certainly "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring) (quoting *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring)).

In short, children are particularly affected by sign advertising, and that impact is particularly insidious because it evades parental control. Such advertising not only interferes with the government's power to prevent solicitations of a criminal transaction, but also with parents' right "to direct the rearing of their children." *Ginsberg*, 390 U.S. at 639. Thus, the interests Massachusetts' regulations protect are not just substantial, but compelling. *Cf. Denver Area Educ. Telecomm. Consortium v. Federal Communications Comm'n*, 518 U.S. 727, 747 (1996) (plurality opinion) (protecting children from indecency is compelling interest); *id.* at 806 (Kennedy, J., concurring) (same); *id.* at 832 (Thomas, J., concurring) (same); *Sable*, 492 U.S. at 126 ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors.").[6]

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[6] Oakland for example, unlike Massachusetts, chose not to regulate on-site and in-store advertising, in an accommodation to the particular interest of lawful consumers in learning where alcohol products are

2. While the government certainly may not reduce public discourse "to that which would be suitable for a sandbox," *Bolger*, 463 U.S. at 74, Massachusetts has hardly swept all adult tobacco speech into the sand. *Compare Butler*, 352 U.S. at 381 (striking down a ban applicable to "any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication, or other thing, including any recordings") *with Pacifica*, 438 U.S. at 750 n.28 ("Adults who feel the need may purchase tapes and records or go to the theaters and nightclubs to hear these words."). The state has only restricted tobacco advertising where children are most likely to see it, within three city blocks of schools and playgrounds, leaving tobacco companies numerous alternative means by which to employ their considerable marketing expertise to convey their commercial message to adults.

These alternatives include local, regional, and national newspapers, magazines of every sort, handbills, the mail, the Internet, promotional merchandise, in-store signs above a child's eye level, and signs in stores closed to minors. The tobacco companies may, moreover, place as many signs as they want in areas more than three blocks from a school or playground, which in most cities would include the concentrated commercial and industrial areas where adults typically work; the regulations impose "no limitations on the number, size, text, or images of the placards" within those

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sold. The Court previously has upheld cities' authority to make precisely that accommodation. *See Metromedia*, 453 U.S. at 511-12. Oakland and Chicago have, however, restricted alcohol billboard advertising near homes, as well as schools and other youth facilities, because, in Oakland and Chicago, pervasive alcohol billboard advertising accosted minors, not only where they played and attended school, but also where they lived. The need for such fine tuning to each locality's circumstances is precisely why this Court has recognized "room for the exercise of legislative judgment" in its commercial speech cases. *44 Liquormart*, 517 U.S. at 508 (plurality).

permissible zones. *Hill v. Colorado*, 120 S. Ct. 2480, 2495 (2000). When considered cumulatively, these alternative channels leave little risk that Massachusetts adults will suddenly cease to hear the tobacco companies' message.[7]

Massachusetts has not deprived adults of commercial information regarding tobacco products, but simply made it more difficult for tobacco merchants to market their product in a way that induces minors to buy it. This Court has in the past upheld a total ban on offsite commercial billboard advertising, *see Metromedia*, 453 U.S. at 508-12, suggesting that such signs generally are not an indispensable medium for commercial speech.[8] Here, the reasons for restricting the commercial speech are far more compelling, and more than sufficient to justify the regulations' incidental burden on commercial advertising to adults.[9]

3. Massachusetts' restriction on tobacco advertising within three blocks of schools and playgrounds have an obvious and close fit to the state's compelling goal of

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[7] Published advertising rates for Massachusetts' principal newspaper suggest that newspaper ads are quite inexpensive. As of March 5, 2001, The Boston Globe quoted a price of $158.78 per column inch for a retail display ad run on a Saturday reaching hundreds of thousands of individuals. *See* <http://extranotes.globe.com/rates.nsf/a0f09e7d9202860-d852565a100522a15/4b680f4aac07c31a8525654800645739? Open Document> (visited March 5, 2001).

[8] Other than a narrow circumstance in which sign advertising historically has played a particularly critical role, *see, e.g., Linmark*, 431 U.S. at 93 (real estate "for sale" signs), this Court has never invalidated a restriction on commercial sign advertising. *See, e.g., Metromedia*, 453 U.S. at 507-512; *Packer Corp.*, 285 U.S. 105 (1932). The regulation overturned in *City of Ladue v. Gilleo*, 512 U.S. 43, 45-46, 58 n. 17 (1994), prohibited *political* speech on yard and window signs placed at one's own home.

[9] To the extent that the Master Settlement Agreement imposes certain limits on advertising by signatories to that agreement, those are limits to which they voluntarily agreed, and which they therefore cannot use as a basis to attack Massachusetts' regulations.

preventing illegal tobacco sales to minors. The steady drum beat of such sign advertising is heard by children not just once, but every day. So long as school is in session, tobacco placards placed just outside the schoolhouse gates will persuade and invite children to buy tobacco just as surely as if the signs were placed inside the school yard. When the advertised product is tobacco (or in the case of Oakland and Chicago, alcohol), and when the viewers are children, the signs have the effect of urging a crime.

There is no obvious alternative—petitioners certainly have suggested none—better fitted to preventing illegal tobacco solicitations of minors than restrictions on tobacco advertising where minors spend most of their time. Requiring such signs to carry a warning to minors obviously would be no help, for the point is not that minors should be permitted to avert their eyes to avoid offense. *Compare Cohen v. California*, 403 U.S. 15, 21 (1971). Children are vulnerable, susceptible, and not yet fully rational; they cannot be expected voluntarily to turn away from an attractive nuisance or an enticement to participate in a crime.[10]

The 1000-foot advertising-restricted zone also is, at the very least, a permissible "rough approximation," *Greater New Orleans*, 527 U.S. at 194-95, of the area in which children will be most likely to be solicited by tobacco advertisements on their way to and from school and play. Large signs may be read by a child with average vision at 1000 feet, *see* 61 Fed. Reg. 44504 (Aug. 28, 1996), and although the tobacco industry Master Settlement Agreement limits the size of advertising signs on behalf of the

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[10] Petitioners note that the Master Settlement Agreement restricts the use of cartoon characters in certain tobacco ads [Pet. Br. 36, No. 00-596], but this restriction plainly is inadequate to address the problem targeted by Massachusetts' regulations. Tobacco advertising signs seen by children every day on their way to school and play induce them to buy tobacco whether or not the signs contain cartoon characters.

signatories, it does not limit the activities of non-signatories. There is, moreover, an "accumulated, common-sense judgment[] of local lawmakers," *see Metromedia*, 453 U.S. at 509, that 1000 feet is an appropriate separation distance from schools and parks to protect children from adult-oriented expression. *Cf. City of Renton*, 475 U.S. at 46. That judgment is born out by experience: When the Oakland City Council held hearings on the appropriate scope for any restrictions on tobacco and alcohol sign advertising, it received testimony from students, teachers, and parents that a pre-existing 500-foot tobacco and alcohol advertising-free zone had proven insufficient to prevent children from being bombarded by such ads on their way to and from school.

Of course, any precise distance is necessarily arbitrary; but "whether or not the [regulatory distance] is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the [state's] Legislature." *Hill*, 120 S. Ct. at 2495. A legislature required to prove whether the "best possible" distance was 900 or 1000 or 1100 feet would be utterly paralyzed, and when it comes to commercial advertisements related to illegal activity, the First Amendment certainly imposes no such exacting requirement. As Justice Stevens recently stated, "Our commercial speech cases recognize some room for the exercise of legislative judgment." 44 *Liquormart*, 517 U.S. at 508 (plurality). Massachusetts has exercised that judgment soundly in this case.[11]

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[11] Petitioners point out that not all of Massachusetts' evidence was undisputed. In the context of commercial speech, however, undisputed evidence has never been necessary to carry the government's burden of proof. As Justice Scalia noted for the Court in *Fox*, it is precisely because of the "difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires" that the Court has required only a reasonable, not a perfect, "fit." 492 U.S. at 481. Even in the noncommercial speech, time, place and manner context, "the question is whether the legislative conclusion was reasonable and

4. Petitioners' suggestion [Pet. Br. 36, No. 00-596] that the affected tobacco advertising does not "relate to illegal activity" unless the advertisers specifically intended to induce illegal transactions misunderstands the reasons why such advertising can be proscribed. Commercial speech advertising illegal products may be prohibited because it encourages criminal transactions. Advertisements for illegal products can have this effect regardless of their intent. Indeed, as Massachusetts' evidence shows, tobacco advertising's impact on minors is now well documented, regardless of intent. And it is the advertisement's effect, not its intent, that justifies prophylactic regulation. Massachusetts may properly regulate to ameliorate this impact, regardless of the intent of those who advertise tobacco products.

"All advertisement is at least implicitly a plea for its audience's custom." *Zauderer*, 471 U.S. at 639. Advertisers carefully study the demographics of the audience likely to view their ads, and are certainly aware that signs near schools are likely to be seen by minors. Such signs frequently include pictures of young, sexy, or "cool" personages that convey a message even "those too young to read" can understand. *Pacifica*, 438 U.S. at 749; *see infra*, at 1a-3a (illustrative

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supported by substantial evidence." *Turner Broadcasting Sys. v. Federal Communications Comm'n*, 520 U.S. 180, 211 (1997); *compare Nixon*, 528 U.S. at 395 (mere conflict among studies provides "little reason to doubt" the legislature's conclusion that "large contributions will work actual corruption"). If the government presents substantial evidence to support the restriction of commercial speech, judges "are not to 're-weigh the evidence *de novo*, or to replace [the legislatures'] factual predictions with [their] own.' " *Turner Broadcasting*, 520 U.S. at 211 (citation omitted); *cf. Fox*, 492 U.S. at 478. As Chief Justice Burger said in a different First Amendment context, "when [the courts] face a complex problem with many hard questions and few easy answers [judges] do well to pay careful attention to how the other branches of Government have addressed the same problem." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973).

alcohol billboards that appeared near Oakland homes, schools, and youth centers depicting scantily clad women and attractive young men who may or may not be of legal age); *see also infra*, at 5a. If these are not circumstances that make it "likely" the ads may influence minors to purchase tobacco, one can scarcely imagine what circumstances are.[12]

The government need not prove that an attractive tobacco ad facing into a playground is *intended* to sway the children at play. Where advertisements, because of their location, present a "circumstance[] likely to pose dangers that the State has a right to prevent," the state is not powerless to do so. *Ohralik*, 436 U.S. at 449. Commercial speech may promote illegal transactions in ways that are not "overt"; that does not disable the state from regulating such speech to prevent inducements to crime. *Cf., Pittsburgh Press*, 413 U.S. at 388.

That said, it is by now a matter of public record that tobacco companies have targeted advertising toward unlawful teenage purchasers. *See, e.g.*, C. Perry, *The Tobacco Industry and Underage Youth Smoking: Tobacco Industry Documents from the Minnesota Litigation*, 153 Archives Pediatric Med. 935, 936, 938 (Sept. 1999); Levy, *RJR Memo Targeted Teen Market*, USA Today, at ID (Oct. 6, 1995). Indeed, Liggett & Meyers explicitly admitted in a recent settlement that "the tobacco industry markets to 'youth, which means those under 18 years of age." *See* Attorneys General Settlement Agreement § 4.1 (March 20, 1997) <http://www.stic.neu.edu/

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[12] *Amicus* Infinity Outdoor, one of the nation's largest outdoor advertising companies, testified at deposition in *Eller Media* that colleges would be the best spot to geographically "target" a population aged 18 to 21—an admission that gives particular significance to a 1996 advertising proposal, produced to Oakland by Infinity in discovery, that lists about 20 sites, all of which are colleges or universities, as "target[s]" for Southern Comfort liquor ads in the Los Angeles area. The same advertising proposal also listed the number of persons "18+" for each site, even though persons aged 18 to 21 are not legal drinkers.

-LIGGETTSETTLE.htm> (visited March 5, 2001). Similar evidence, discovered in the *Eller Media* litigation, indicates that alcohol advertisers have done the same.[13] The state must be permitted sufficient leeway to prevent such illicit targeting.[14]

5. Nor will permitting Massachusetts some room to restrict commercial tobacco advertisements within three blocks of schools and playgrounds leave the flood gates open to advertising restrictions on a broad array of other products that may not be appropriate for minors. *Compare* ANA Br. 19-20. Any restriction on commercial speech for a product illegal to minors but not adults must have a "reasonable fit" to preventing a serious problem of illegal sales to minors. To meet that test, the regulation must leave open sufficient means for lawful, adult consumers to learn about the product and must be justified by the need to prevent a demonstrably

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[13] Evidence in *Eller Media* included statements by Anheuser-Busch, for example, crowing over the success of a billboard ad campaign that depicted Budweiser "spokespooch" Spuds MacKenzie, whom the company describes as a "party animal par excellence," on a *skateboard*; in the same litigation, *amicus* Infinity Outdoor admitted that if a billboard ad depicted skateboarding, it "would seem to suggest they're targeting kids rather than adults." Similarly, a document produced by Eller Media Co. identified the "target" for a national Bartles & Jaymes wine cooler ad campaign as "Adults 18-49"—even though the legal drinking age is 21. Another document, an industry study on the effects of "Budweiser/Bud Dry Beer Awareness" and "Captain Morgan Spiced Rum Awareness," listed persons aged 18-24 as a "target." *See also* note 12, *supra*.

[14] It would be crippling were a state or municipality required to conduct discovery in each instance to determine the intent of such advertisements. In all likelihood, only the ad man will ever know for certain what he had in mind when he placed an attractive tobacco placard facing into a playground. If the government were required to prove, not only solicitation in circumstances likely to induce illegal transactions, but also a specific intent to make such a solicitation, the government's ability to prevent inducement to illegal commerce would be "substantially diminished." *Ohralik*, 436 U.S. at 466.

real underlying problem. *See Edenfield*, 507 U.S. at 770-71; *see supra*, at 14-15.

The evidence of widespread harm from underage tobacco and alcohol purchase and use is overwhelming. As this Court noted last Term, tobacco addiction is "one of the most troubling public health problems facing our Nation today." *Brown & Williamson Tobacco*, 529 U.S. at 125. The Food and Drug Administration has found that most of the 400,000 smokers who die each year began smoking regularly when they were minors. *Id.* at 127-28. Illegal youth drinking is similarly epidemic—almost half of children have been *drunk* before 10th grade, *see* Public Health Service, U.S. Dep't of Health & Human Servs., 1 "Drug Use Among American High School Seniors, College Students and Young Adults, 1975-1990," at 91 (1991)—and at least as dangerous: The record in *Eller Media*, for example, established that more than half of students at one high school reported either driving while drunk or riding with a drunk driver. The record also implicated illegal youth drinking in rapes, homicide, traffic accidents, assaults on police officers, and rioting.[15] On such facts, the reasons for restricting tobacco and alcohol advertising to children outside schools and playgrounds are far stronger than those this Court found sufficient, in *Pacifica Foundation*, to support restrictions on the broadcast of seven "filthy words."

The same cannot be said for virtually any of the other products that *amicus* ANA fears the government will suddenly decide to regulate. There is no crisis of twelve year olds illegally buying cars, renting hotel rooms, enrolling for telephone services, purchasing pesticides, employing escort

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[15] Oakland's youth drinking problem had also resisted a lengthy, multi-prong campaign of enforcement, education and regulation pursued by Oakland before it finally adopted complementary restrictions on the locations of alcohol advertising. *See infra*, at 16a-19a.

services, trading in securities, or—of all unlikely things suggested by *amicus*—misacquiring public transportation tickets. Nor do any of these products have either the addictive qualities of tobacco and alcohol that make minors' use particularly dangerous, or a similar history of tacit marketing to minors. Indeed many of the products cited by *amicus* may quite lawfully be given or sold to minors. If the state were suddenly to restrict advertising for these other products it would need to demonstrate that its regulations had a "reasonable fit," *Fox*, 492 U.S. at 480, to the redress of a serious problem. In this regard, tobacco and alcohol stand in a class by themselves. If any of the other products about which *amicus* ANA expresses concern should in fact become associated with societal problems of the dimensions of unlawful underage tobacco and alcohol sales, restrictions on their commercial promotion would, and should, begin to assume a quite different constitutional complexion.

For this reason, ANA's parade of horribles does not establish that upholding the constitutionality of Massachusetts' regulations would pose a credible hazard of a slippery slope. It plainly makes both constitutional and common sense for the government to be able to restrict ads, near the schoolyard and playground, for a product that is illegal to sell to children, a product the widespread underage use of which has not only dangerous, but often deadly, consequences. As Justice Stevens has written, "[a] picture which may appropriately be included in an instruction book may be excluded from a billboard." *Carey*, 431 U.S. at 717 (Stevens, J., concurring). This case proves that point.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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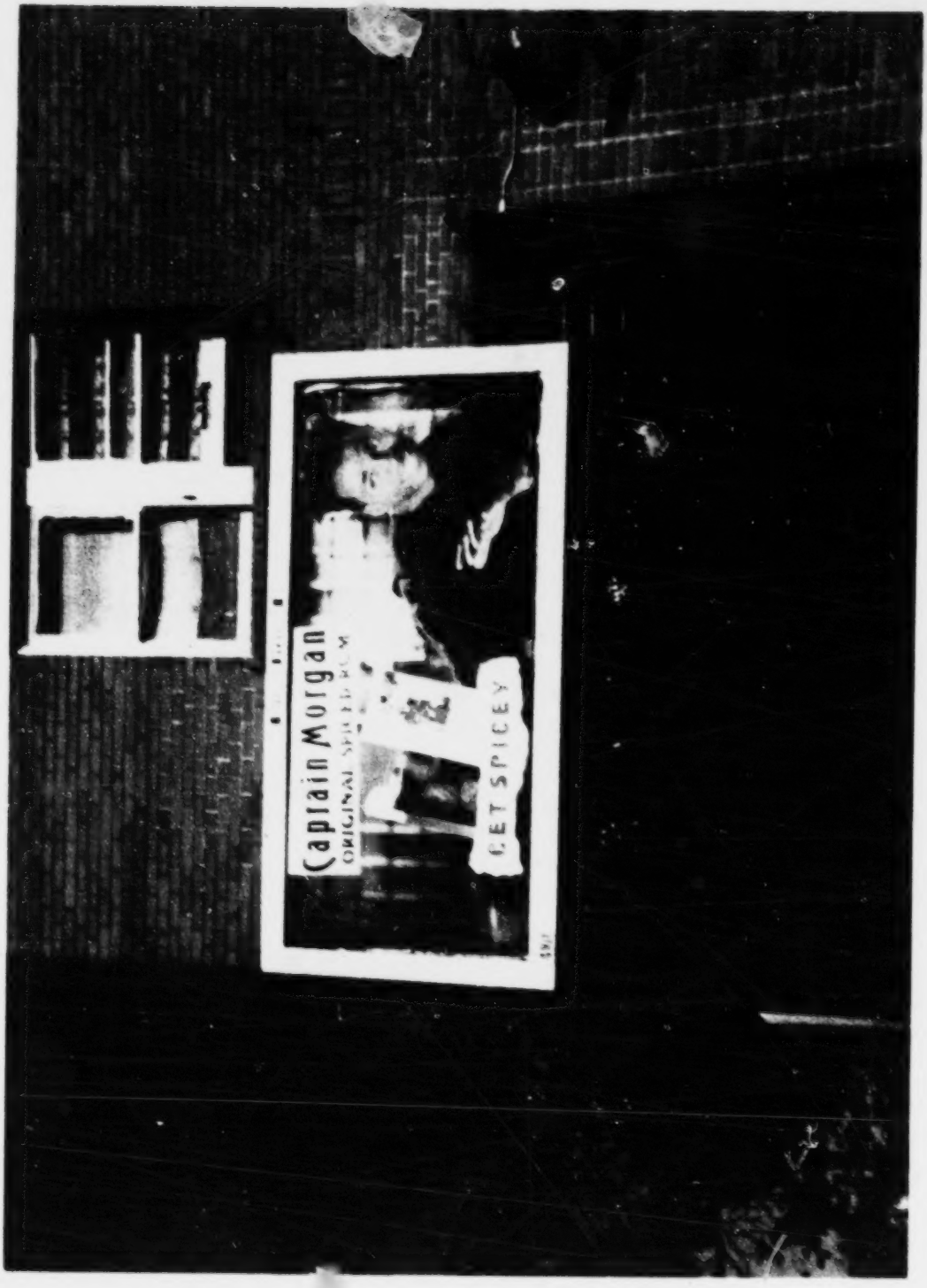
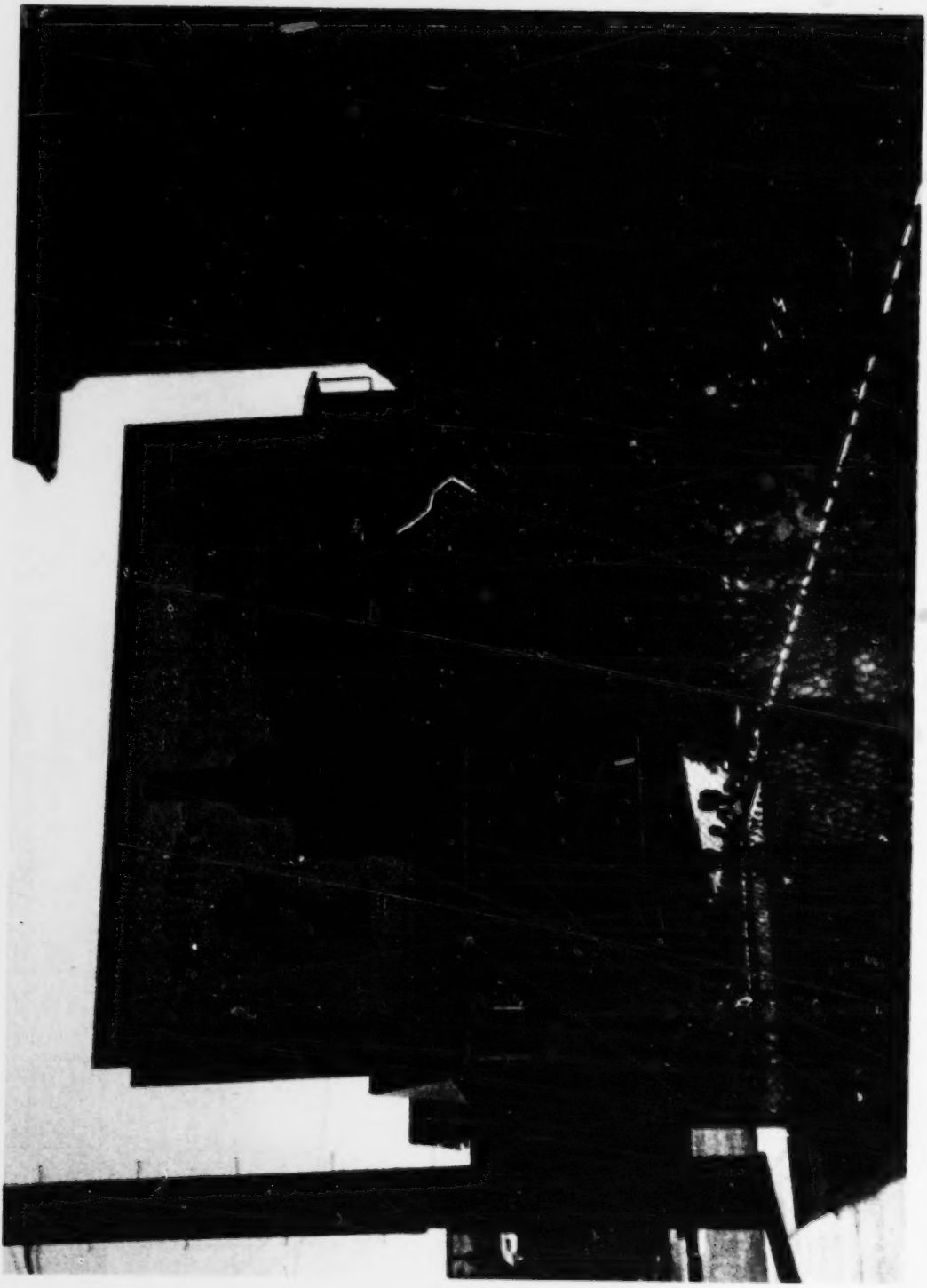
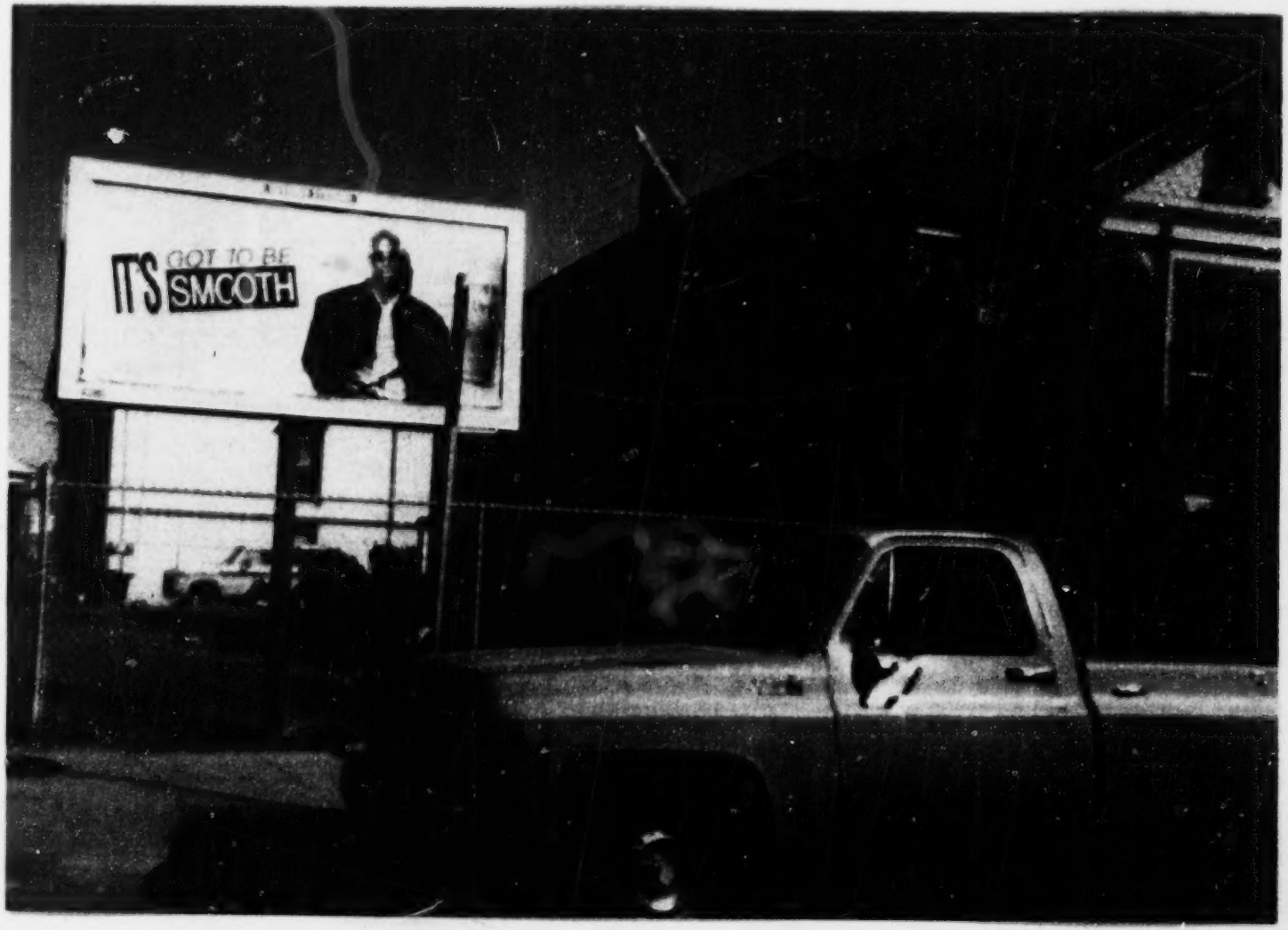
APPENDIX A






IT'S GOT TO BE
SMOOTH

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 98-02237 WHA

ELLER MEDIA COMPANY and INFINITY OUTDOOR,
Plaintiffs,

v.

CITY OF OAKLAND,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND DENYING PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

INTRODUCTION

Plaintiffs Eller Media Company and Infinity Outdoor, vendors of billboard space, bring a First Amendment challenge to an Oakland city ordinance that prohibits alcoholic-beverage advertising on billboards in areas where minors tend to live, play, and go to school. This order holds that, under the test for commercial speech set forth in *Central Hudson Gas & Electric Corp.*, 447 U.S. 41 (1980), Oakland's ordinance is constitutional.

STATEMENT

In December 1997, the Oakland City Council adopted Ordinance No. 12025 C.M.S., amended in October 1998 by Ordinance No. 12085, which restricts the use of billboards to

promote alcohol, with enumerated exceptions.[1] Oakland adopted the ordinance to stem minors' purchase and consumption of alcohol. Before the ordinance took effect, billboards advertising alcohol were common in neighborhoods where minors lived, played, and attended school—particularly in low-income and minority neighborhoods. Examples of these billboards included depictions stylish young adults holding glasses of liquor and young women in bathing suits reclining next to bottles of Seagram's. One recurrent example showed a grinning young man with Captain Morgan Original Spiced Rum and the tag line "Get Spicy!"

The ordinance does not ban all outdoor signs; instead, it restricts the time, place, and manner of alcoholic-beverage advertising. It targets outdoor signs where children live, play, and go to school. Exceptions to the general prohibition include signs located within areas designated as "Business Mix," "General Industrial/Transportation," "Mixed Use Waterfront/Estuary Plan Area," or "Regional Commercial." Within these excepted areas, however, no sign advertising alcohol may face into adjoining areas with different land-use designations, and no sign advertising alcohol may be within 1000 feet of schools, city-owned youth-recreation centers, licensed child-care facilities, places of worship, or Raimondi Field. Also excepted from the general prohibition are signs inside premises that sell alcohol; signs on commercial vehicles used to transport alcohol; on taxicabs; signs used in conjunction with one-day or temporary alcoholic-beverage sales licenses; signs that serve to identify businesses that sell alcohol by depicting their name or slogan; signs that do not refer to a specific brand of alcoholic beverage; and signs next to and facing an interstate highway. Finally, the ordinance does not prohibit signs opposing the use of alcoholic beverages or tobacco products.

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[1] The ordinance also targets outdoor signs that promote tobacco. Plaintiffs do not challenge that aspect of the ordinance, however.

Plaintiffs Eller Media Company and Infinity Outdoor lease billboards in Oakland (and other locations throughout the United States) for advertising, including advertising for manufacturers, distributors, and retailers of alcoholic beverages. When the ordinance went into effect on June 7, 1998, Eller Media's billboards available for alcohol advertisers in Oakland dropped from 788 to 54, and Infinity's dropped from 612 to 29. Before the ordinance, Eller leased about 14% of its billboards to alcohol advertisers; after the ordinance, that dropped to about 7%. For Infinity, the figures were 9% to 4.5%.

In October 1997, before the ordinance was enacted, the Oakland city manager reported to the Oakland Council Public Safety Committee that outdoor commercial advertising was a form of speech entitled to First Amendment protection, and that the ordinance had to satisfy the four-part test for commercial speech adopted by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980). The council enacted the ordinance after holding public hearings and considering submitted material, which is appended as Exhibit F to the declaration of Mark Wald in support of Oakland's motion.

Soon before the ordinance took effect, plaintiffs sued to enjoin its enforcement on the ground that it violated the First Amendment. The case was originally assigned to the Honorable Fern M. Smith, who preliminarily enjoined Oakland from enforcing the ordinance against noncommercial speech that related to alcoholic beverages, but allowed it to prohibit covered speech that contained both commercial and non-commercial messages. In response to the ruling, Oakland adopted Ordinance No. 12085, amending the original ordinance to make clear that it does not restrict noncommercial speech.

Next, plaintiffs moved for partial summary judgment and a permanent injunction, and Oakland moved for summary judgment. Judge Smith denied these motions. In denying Oakland's motion, Judge Smith held that the record had not

been sufficiently developed for the Court to determine whether the ordinance was narrowly tailored to further its ends, as *Central Hudson* requires:

> The City has failed to explain why the less speech-invasive means proposed by plaintiffs are not equally effective at mitigating the asserted harms. The single inroad the City has made in this regard is to cite the approximately three hundred minor decoy operations conducted between 1995 and 1997. *See* Blanchard Report at 5. All the same, the evidence thus far submitted does not show whether this effort was unsuccessful or was somehow inadequate as an alternative to the Ordinance. Because the record contains very little in the way of legislative findings on this topic, and because plaintiffs raise a legitimate concern that the Court is required to consider under prong four [of the *Central Hudson* test], summary judgment at this point is premature.

In light of her ruling on prong four, Judge Smith declined to decide whether Oakland had proved that the exceptions to the ordinance would not prevent if from materially reducing underage consumption and purchase of alcohol, as required by prong three of *Central Hudson*. Judge Smith did, however, determine "that advertising and increased consumption are related; thus, billboard advertising and youth consumption are, too" (Order at 17-18). The order also noted that the speech restriction in this case was not as facially irrational as those in some of the cases cited by plaintiffs.

This case was then reassigned to the undersigned. The parties have now filed cross-motions for summary judgment. They agreed at oral argument that the Court should decide this case on the papers, and can make findings of fact as necessary, including any credibility and weight determinations.

ANALYSIS

1. Level of Scrutiny

Plaintiffs argue that the ordinance is subject to strict scrutiny rather than the lesser scrutiny employed by Judge Smith under *Central Hudson*. Two lines of cases, plaintiffs argue, mandate a more heightened review. The first is what plaintiffs call the *Butler* line, which emphasize that the Government may not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The second line of cases, according to plaintiffs, suggests that courts should apply strict scrutiny to commercial speech restrictions when the government targets the speech based on its content. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The Supreme Court has been wary, it is true, of the government restricting speech that is appropriate for adults merely because it is not appropriate for children. In *Butler*, the Court reversed the conviction of a Michigan man who sold "a book or descriptions, tending to incite minors to violent or depraved or immoral acts, [and] manifestly tending to the corruption of the morals of youth." *Butler*, 352 U.S. at 381. Michigan argued that it had exercised its power to promote the general welfare by outlawing books suitable to adults in order to protect minors. The Court responded that to take such an approach was "to burn the house to roast the pig," and held that the law was "not reasonably restricted to the evil with which it is said to deal." *Id.* at 383. More recently, citing *Butler*, the Court applied strict scrutiny to invalidate a statute that required cable owners who provided channels "primarily dedicated to sexually-oriented programming" to "fully scramble or otherwise fully block" those channels or to omit their transmission to hours between 10:00 p.m. and 6:00 a.m. *United States v. Playboy Entm't Group, Inc.*, 120 S. Ct. 1878, 1882-83 (2000) (quoting 47 U.S.C. § 561(a)). The Court held that the government had failed to establish a pervasive, nationwide problem of child exposure to pornography, or to prove the

ineffectiveness of an alternative protection, such as notifying viewers of the potential for "bleed" from a scrambled and allowing them to request that it be blocked. *Id.* at 1890-91.

The *Butler* line does not control this case for the simple reason that *Butler* and its progeny did not address commercial speech. *Butler* itself dealt with a statute that banned all books and other material that might corrupt the morals of Michigan youth. The statute targeted not commercial speech, but corruptive speech. Likewise, the legislation in *Playboy Entertainment* did not target commercial speech, but sexually explicit television programming. This case is further distinct from *Butler* because the ordinance here does not create a blanket ban on speech about alcohol.

Even if *Butler* does not apply, plaintiffs argue, the Supreme Court has, in fact, erased the difference in scrutiny between commercial-speech and non-commercial-speech cases, at least as to content-based restrictions. For this proposition, plaintiffs cite *R.A.V. v. City of St. Paul, 505* U.S. 377 (1992). *R.A.V.* invalidated a St. Paul ordinance prohibiting fighting words that insulted or provoked violence based on "race, color, creed, religion or gender." *Id.* at 391 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul Minn., Legis. Code § 292.02 (1990)). The Court held that, even though the State could proscribe fighting words as an indivisible category, the State could not proscribe a sub-category of fighting words based on their content unless the restriction was necessary to serve a compelling interest. *Id.* at 381. In its discussion, the Court used commercial speech to provide and example of impermissible content-based discrimination:

> And to take a final example . . . , a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection . . . is in its view greater there).

> But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Id. at 388-89 (citations omitted). The case did not involve commercial speech, and this example was thus merely a dictum. Nonetheless, plaintiffs suggest that it tolled a death knell for lesser First Amendment scrutiny of content-based restrictions of commercial speech, and argue that this Court should apply a higher level of scrutiny here.

Plaintiffs' forecast of the implications of *R.A.V.*, however, is premature at best. Since *R.A.V.*, the Supreme Court has continued to apply the more lenient *Central Hudson* test to restrictions on commercial speech, even in cases of alleged viewpoint discrimination. *See, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999) (applying *Central Hudson* test to regulations restricting advertising for casino gambling but excepting gambling sponsored by Native Americans). Even before the Supreme Court's *Greater New Orleans* decision, the Ninth Circuit, addressing the issue in dicta, expressed doubt that *R.A.V.* should apply to commercial speech:

> Although *R.A.V.* requires that the content-based regulation of proscribable classes of speech be subject to strict review, it is unclear whether *R.A.V.'s* holding extends to commercial speech. Despite a suggestion in *R.A.V.* that strict scrutiny indeed does apply to the content-based regulation of commercial speech . . . , the Supreme Court has continued to apply *Central Hudson* in the commercial speech context in cases following *R.A.V.* Several courts have, however, either applied or considered the potential application of *R.A.V.* to regulations restricting commercial speech. Although the applicability of *R.A.V.* in the commercial speech context poses a question of interest, we need not resolve it. Even were we to conclude that *R.A.V.* applied, we are persuaded that [the statute at issue] would fall outside its scope.

Valley Broad. Co. v. United States, 107 F.3d 1328, 1331 (9th Cir. 1997). Though the Ninth Circuit has not squarely addressed the issue, the First Circuit has. In a case factually similar to this one, the First Circuit declined to apply the strict scrutiny of *R.A.V.*, noting that "the Supreme Court has made clear that even regulations which single out the promotional speech of a particular industry are analyzed under the *Central Hudson* test." *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 42 (1st Cir. 2000). For the reasons discussed herein and by the First Circuit, this Court, too, declines to apply the strict scrutiny suggested by plaintiffs. The analysis shall proceed under the test set forth in *Central Hudson*.

2. Application of the Central Hudson Test

Central Hudson set forth a four-part analysis for First Amendment challenges to restrictions on commercial speech. At the first step, the court asks whether the First Amendment protects the expression. To be protected, speech must concern lawful activity and not be misleading. At the second step, the court asks whether the asserted governmental interest is substantial. If the answer to the first two questions is yes, the court asks at the third step whether the regulation directly advances the governmental interest asserted. At fourth step, the court asks whether the regulation is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

After Judge Smith's denial of Oakland's first motion for summary judgment, a limited part of the third prong and the whole fourth prong of *Central Hudson* remain in dispute.[2] At prong three, Judge Smith determined that advertising increases underage drinking. She left open, however, the opportunity for

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[2] The parties agree that the first two prongs of *Central Hudson* are met: the speech at issue is lawful and the government interest in stemming minors' consumption of alcoholic beverages is substantial.

plaintiffs to prove that the exceptions to the ordinance undermine its effectiveness. That possibility notwithstanding, as Judge Smith recognized, the main question in this case is at prong four: could Oakland have employed less burdensome alternatives to discourage minors' purchase and consumption of alcohol?

A. Prong Three—Material Advancement

Oakland bears the burden at the third prong of the *Central Hudson* test of showing that the ordinance directly advances the goal of stemming underage consumption of alcohol. This burden "is not satisfied by mere speculation or conjecture"; rather, Oakland "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans*, 527 U.S. at 188. Judge Smith already determined that the harms listed by Oakland are real. She also already determined that alcohol advertising leads minors to drink. Judge Smith left open, however, the possibility that the ordinance's exceptions prevent it from materially advancing its goal.

To set the stage, the Court notes that the ordinance is not the only government regulation of alcohol and alcoholic-beverage advertising in effect in Oakland. First and foremost, California state law dictates that people under the age of 21 may not legally buy or consume alcohol. As discussed in the next section, Oakland enforces these laws. Since the 1970s, Oakland has also restricted the location of new alcohol outlets. Generally, no new liquor store may be within 1000 feet of any school, licensed day care center, church, public park, or playground. The size of signs in liquor stores are also regulated. With this background in mind, the Court turns to the exceptions to the ordinance.

Plaintiffs contend that myriad exceptions render the ordinance ineffective. Oakland allows the display of liquor ads—including neon signs—inside stores, and in store windows, regardless of location; Oakland allows delivery trucks to

advertise alcohol; it allows and profits from alcohol ads and sales at its Coliseum;[3] and Oakland allows alcoholic-beverage displays at the Oakland Airport. Plaintiffs also contend that Oakland allows alcohol advertising on City-owned land during special events. For example, an "Oktoberfest" was held at the Coliseum in connection with an A's baseball game; and family events sponsored by alcoholic beverage companies are held at Jack London Square.

The Court has reviewed the evidence regarding the exceptions and agrees with plaintiffs that minors are exposed to alcoholic-beverage advertising that the ordinance does not prohibit. Nevertheless, the Court finds that Oakland has a well-founded belief that the ordinance as written, exceptions and all, will serve its purpose.

Oakland points to expert and documentary evidence that billboards' unique characteristics make other media imperfect substitutes for reaching youth. These unique characteristics include the ability: to reach a broad range of citizens at a relatively low cost; to communicate with citizens in settings where other advertising media are unavailable or impractical; and to advertise with particular potency to children and adolescents in urban neighborhoods, where billboards are unavoidable and beyond parental control. Dr. Esther Thorson, one of Oakland's experts, opines that "alcohol advertisers who try to replace their Oakland billboards advertisements with TV, radio, newspapers, or other media will not be able to reach Oakland youth nearly as often or effectively for the same budget" (Thorson Decl ¶¶ 6-7; Wall Decl., Exh. 12 (Thorson Rep. ¶¶ 5, 9-10, 109-10, 130). "They will also lose the well-

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[3] Oakland allows beer advertisements B often illuminated B at concession stands, on ballpark fences facing the infield, on illuminated signs at eye level on the walls lining a walkway through which attendees must pass in the Stadium, and on a large electric scoreboard that is visible from a very limited part of the surrounding area.

documented synergistic effects," Dr. Thorson adds, "*of running* advertisements on billboards and [in] other media concurrently."

Oakland also lists admissions by plaintiffs on the efficacy of billboard advertising:

- Billboards are more cost-effective per advertising "impression" than any other major medium (Wall Decl., Exh. 21 (Infinity Dep. 33:10-18) and Exh. 22 (Eller Dep. 89-90, 156-57). As one plaintiff put it, "billboard advertising reaches the most people for the least cost of all general market advertising" (Wall Decl., Exh.44). Or, as Infinity conceded, advertisers "get more bang for their buck by going with billboards" (Wall Decl., Exh. 21 (Infinity Dep. 35:14-20).

- Outdoor advertising "is seen all day, every day," in Plaintiffs' words. "It cannot be turned off like television, tuned out like radio or discarded like newspapers and magazines" (Wall Decl., Exhs. 74 (24789 OS), 21 (Infinity Dep. 64 ("[W]e are proud to say, yes, that billboards cannot be turned off, cannot be avoided . . . . cannot be discarded like you can throw away a newspaper.")), 22 (Eller Dep. 56), 38, 71.

- Minors pay especially close attention to billboards (Wall Decl., Exhs 70, 49 (15584 Eller-15585 Eller). Studies show that children's awareness of billboards is, in the words of a billboard company analysis, "remarkable." "When compared to older viewers, the kids outscored adults in perception, remembrance and correct identification of outdoor advertised messages seen" (Wall Decl., Exh. 47 (memorandum to all Patrick Media Group, Inc. account executives).

- Plaintiffs' own written sales pitch claims when billboards are taken away, advertising in other media is less effective (Wall Decl., Exhs. 41, 61, 45, 67).

- Plaintiffs' own research shows that billboard advertising increases consumption even when other media are simultaneously used (Wall Decl., Exhs. 30, 51, 21 (Infinity Dep. 26:18-29:20).

Two of the most notable of these admissions are that children's awareness of billboards is "remarkable" and that advertising on billboards works even when other media are used.

Oakland also points out that, although youths and parents raised repeated concerns about alcohol ads on billboards where children live, play, and go to school, they did not raise concerns about youth exposure to other types of alcohol advertising. Minors' exposure to advertising at special events, in the airport, and on delivery trucks, Oakland argues, is much less frequent than their exposure to billboards in their neighborhoods and near their schools.

This Court need not resolve the parties' conflicting evidence and decide as a matter of fact whether the ordinance has or will materially cut the rate of underage drinking. Oakland has produced evidence that billboard advertising has qualities that other forms of advertising cannot replace. A difference of opinion or conflicting evidence on this issue is not sufficient to deprive Oakland of its ability to regulate alcohol advertising based on a well-founded conclusion that it leads to underage drinking. *See Consolidated Cigar*, 218 F.3d at 48 n. 10. Judge Smith has already found that billboard advertising does increase underage drinking. And Oakland has produced evidence that billboard advertising is effective even when other media are employed. It thus stands to reason that eliminating alcohol advertising on billboards in areas frequented by minors will materially advance Oakland's goal even if alcoholic beverages are still advertised in other media.

B. Prong Four-A Reasonable Fit

Under *Central Hudson's* fourth prong, the ordinance needs "a fit that is not necessarily perfect but reasonable" to achieve its

goals. *Board of Trs. of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989). Judge Smith identified the relevant questions: (1) does the ordinance leave open other channels of speech? and (2) are there "numerous and obvious less-burdensome alternatives" to the regulation? (Order at 22). After arguing on prong three that Oakland left open too many channels of speech, plaintiffs do not vigorously dispute that the answer to the first question is "yes." On the second question, however, plaintiffs suggest multiple alternatives to the ordinance.

Although plaintiffs do not contest that other channels of speech are left open for alcoholic-beverage-advertising, it is a point worth discussing. Oakland has not imposed a blanket ban on alcoholic-beverage advertising. The ordinance allows alcoholic-beverage advertising on outdoor signs in areas not likely to be frequented by minors; indeed, of their Oakland signs used for alcohol ads before the ordinance, plaintiffs still lease about 50% for that purpose now. The ordinance does not prohibit alcohol ads on television, in magazines, in newspapers, on the Internet, or on the radio. Advertisers of alcoholic beverages still have avenues for presenting their message to people in Oakland.

Moving to less burdensome alternatives, plaintiffs list several that would inhibit minors' ability to buy alcohol. For example, plaintiffs suggest increasing alcohol fees, increasing enforcement of laws against minors' consumption of alcohol, initiating "party patrols" based on community tips, initiating a program of breathalyser tests, and setting curfews.

Oakland has three responses. First, Oakland argues, it does sponsor programs to reduce minors' access to alcohol, including enforcement of underage-drinking laws. It has conducted hundreds of undercover sting operations, it has focused resources on youth cruising, it has increased its drunk driving enforcement, and it has heightened enforcement of truancy laws. Oakland also recently created a multi-agency Alcoholic Beverage Action Team, now staffed by three police officers, a

code compliance officer, a zoning officer, a deputy city attorney, a hearing officer, and two Police Department civilians. Among other enforcement efforts, the Team inspects alcohol outlets to prevent the conditions that foster illegal sales. And Oakland has done all this, it notes, despite having a violent crime problem and budget shortfalls.

Second, Oakland argues, at least some of plaintiffs' ideas are not workable. For example, though plaintiffs suggest that Oakland could raise the tax on alcohol in order to raise the price of alcohol, Oakland does not have the authority to increase a tax specifically on alcohol. Oakland can tax "retailers" uniformly, but the cost of any such tax to the consumer would be spread over a variety of goods. Moreover, such a tax would not target minors, but rather would mostly affect adult consumers.

Third, Oakland argues, the ordinance *complements,* rather than supplants, its programs to stem the supply of alcohol to minors. In other words, even if Oakland were to implement all of plaintiffs' suggestions, and they functioned as plaintiffs presume, the ordinance would still materially advance the goal of discouraging underage drinking. The ordinance is aimed at diminishing minors' desire to drink, while enforcement programs are aimed at minors' ability to do so. As noted the First Circuit noted in a similar case, restrictions on advertising reduce the psychological incentives to use the targeted product:

> [T]he restrictions on advertising should reduce the number of new or future users by reducing the visibility of tobacco products to minors, by dispelling the advertising-encouraged notion that tobacco products are pervasive and form part of the "good life," and by eliminating the psychological incentives to tobacco use presented by things such as simple as attractive ad color and design (aspects of advertising which we agree may reasonably be assumed to have greater effect on young people).

Minors' desire to drink remains relevant even if enforcement programs make it harder for them to buy alcohol. Oakland has submitted evidence that many minors procure alcohol from sources other than commercial outlets, such as from parents or older friends. Put differently, the alternatives listed above focus largely on the "supply" side of the equation whereas the ordinance focuses on the "demand" side.

In addition to suggesting ways to inhibit minors' access to alcohol, however, plaintiffs also argue that Oakland can address the desires of minors in less restrictive ways than the billboard ban. In particular, they suggest one-on-one intervention sessions to help youth understand alcohol dependence, marketing the social norm of abstinence, and mentoring focused on alcohol education. In other words, counterspeech. Oakland responds in two ways: first, that it does engage in counterspeech, and, second, that the additional counterspeech suggested by plaintiffs is either unrealistic, or bound to be ineffective.

Oakland sponsors many programs for educating youth about alcohol. These programs include, among others, Office of Parks and Recreation life-enrichment classes and drug-free sports leagues, grants to Oakland nonprofits such as the Boys and Girls Club and Just Say No! International that run alcohol-education programs, Head Start health education classes for teen parents, anti-substance abuse efforts with the Golden Sate Warriors and the Summit Medical Center, and a Police Activities League that mentors "at risk" youth. Again, Oakland believes, and has produced evidence, that such programs complement, rather than replace, the effect of the ordinance.

In denying Oakland's first motion for summary judgment, Judge Smith noted that the evidence thus far submitted did not show whether Oakland's enforcement efforts were unsuccessful or were somehow inadequate as an alternative to the Ordinance. That concern now has been adequately addressed by Oakland. Evidence shows that minors do not always, or even usually,

obtain alcohol by buying it in outlets. An enforcement program at the point of purchase, even if it is successful, cannot constitute an adequate substitute for the ordinance, which targets the psychological incentives for youth to drink.

Finally, plaintiffs challenge the ordinance's prohibition on billboards within 1000 feet of schools, city-owned youth-recreation centers, licensed child-care facilities, places of worship, or Raimondi Field. According to plaintiffs, 1000 feet is arbitrary and excessive. The First Circuit rejected the same argument, reasoning that such a determination "is generally better suited for legislative and executive decision makers than for courts." *Consolidated Cigar,* 218 F.3d at 50. "In the end," concluded the court, "one thousand feet—a mere three city blocks—does not strike us as an unreasonable distance in which to assume that minors present at or on their way to or form schools and playgrounds would be most affected by outdoor advertising." *Ibid.* This Court agrees that 1000 feet is a reasonable fit.

Oakland is not required to recognize and pursue every alternative to the ordinance. It has produced evidence of a broad campaign against underage drinking. The different facets of that campaign do not, in Oakland's judgment, replace the ordinance, but complement it. The Court finds this view well-founded given the evidence in the record. The ordinance is not a blanket ban on speech about alcoholic beverages; plenty of fora remain open for such speech. The ordinance is a reasonable fit to the goal of decreasing youth demand for alcoholic beverages.

CONCLUSION

Oakland has carried, its burden of showing that the ordinance materially advances the goal of stemming underage drinking and that it is narrowly tailored to achieve that goal. Plaintiffs' motion for summary judgment and a permanent injunction is DENIED. Defendant's motion for summary judgment is GRANTED. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: December 7, 2000

WILLIAM ALSUP
United States District Judge

MAR 26 2001

No. 00-596, 00-597

Supreme Court, U.S.
FILED
MAR 26 2001
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IN THE
Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL
OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL
OF MASSACHUSETTS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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March 26, 2001

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QUESTIONS PRESENTED

1. Whether state regulations that restrict the permissible locations for tobacco advertising, but do not affect the federally mandated health warning for cigarettes, are preempted by the Federal Cigarette Labeling and Advertising Act.

2. Whether, under the First Amendment, regulations that merely restrict the display of publicly visible tobacco advertising in locations near schools and playgrounds are properly analyzed under the intermediate scrutiny test set forth in *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980), and, if so, whether the regulations satisfy that test.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1335, particularly § 1334(b), which states:

   No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

2. First Amendment to the U.S. Constitution, which states:

   Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

INTERESTS OF *AMICI CURIAE* [1]

The American Planning Association ("APA") is a nonprofit, educational research organization dedicated to advancing state and local land-use planning. APA has state chapters covering all 50 states, including a Massachusetts chapter with over 800 members. With more than 30,000 members, it is the oldest and largest organization in the United States devoted to fostering livable communities through comprehensive land use planning. Because its members serve government agencies and private parties, the APA seeks to preserve the proper role of government in protecting communities, and the children who live, attend

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs, and they filed a letter reflecting consent with the clerk.

schools and play in those communities, as well as constitutional protections for freedoms of speech and press.

For most communities, where virtually all local elected leaders strive to make their town "beautiful as well as healthy, spacious as well as clean," *Berman v. Parker*, 348 U.S. 26, 33 (1954), sign regulation is an important tool of zoning and planning, as "billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Metromedia v. San Diego,* 453 U.S. 490, 510 (1981). Since the vast majority of both on-site signs and off-site billboards display commercial advertising, any doctrinal change by this Court to elevate commercial speech to a higher level of First Amendment protection than that defined in *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980), could severely hobble local governmental efforts to preserve, protect and improve the appearance of the community.

STATEMENT OF THE CASE

The APA adopts the statement of the case set forth in respondent's brief.

SUMMARY OF ARGUMENT

The APA is deeply concerned about both the narrow and the broad issues presented in this case. The narrow issue is the ability of states and communities to shield children, when in the areas where they learn and play, from intrusive, manipulative images promoting the use of tobacco, a legally tolerated, highly addictive drug which is physically destructive both to users and others near them. The broader issue, urged by the tobacco companies and their friends in the advertising and retailing trades, is whether commercial speech should now receive equal or nearly equal protection with classical "core" speech—advocacy on the timeless topics of politics, religion, science, art, philosophy, moral and

ethical issues. On the narrow issue, the tobacco sellers brazenly proclaim that their economic and expression freedoms are more important than the health of children and society's need to reduce the devastating impact of tobacco addiction on public health and the public fisc. On the broader issue, the advertising interests entreat this Court to do nothing less than destroy the hierarchy of values, the foundation of this Court's First Amendment commercial speech jurisprudence. Such a move would not only trivialize the First Amendment, by granting the same constitutional dignity to sales pitches for plastic storage containers as to civil rights marches, it would also cheapen and demean the history, tradition, and the purpose of the First Amendment itself.

Both the narrow and the broad positions advocated by petitioners and their supporters should be rejected.

ARGUMENT

I. THE MASSACHUSETTS REGULATION IS NOT PREEMPTED BY THE FEDERAL ACT.

A. Most Federal Courts of Appeal Have Correctly Concluded That Congress Intended to Preempt Only Message Content, and Not Sign Location.

Four of the federal circuit courts of appeal have considered the question of whether the Federal Cigarette Labeling and Advertising Act ("FCLAA," 15 U.S.C. §§ 1331-1335) prevents state and local governments from regulating the location of tobacco signs. The first and fourth circuits concluded that while Congress intended to regulate *statements* concerning smoking and health, just as this Court concluded in *Cippolone v. Liggett Group*, 505 U.S. 504 (1992), it also left unrestrained the traditional rights of state and local governments to set rules about where signs may be displayed. *Consolidated Cigar v. Reilly*, 218 F.3d 30 (1st Cir., 2000), *Federation of Advertising Industry Representatives, Inc. v. Chicago*, 189 F.3d 633 (7th Cir.,

1999), *cert. den.*, 529 U.S. 1066 (2000) ("FAIR"), *Penn Advertising of Baltimore, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir., 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir., 1996), *cert denied*, 520 U.S. 1204 (1997).

The Second Circuit's two cases on point illustrate the proper scope of federal preemption. In *Vango Media v. City of New York*, 34 F.3d 68 (2nd Cir., 1994), the court struck a New York City ordinance which required one public health message, defined as "pertaining to the health dangers of smoking or the health benefits of not smoking" for each four tobacco ads displayed, and required that 25% of such anti-tobacco ads be directed to the youth population. Since the regulation obviously concerned the content of smoking and health messages, it was held preempted. Yet, in *Greater New York Metropolitan Food Council, Inc., v. Giuliani*, 195 F.3d 100 (2nd Cir., 1999), *cert. den.*, 529 U.S. 1066 (2000), the same court upheld regulations prohibiting most tobacco billboards within 1,000 feet of places where children congregate.

The lone exception to this pattern is the Ninth Circuit, which refused to follow its fellow circuits and held that FCLAA preempted both message regulation and sign location. *Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir., 1999), amended 203 F.3d 1150 (2000).

B. This Court's *Cipplone* Holding, That Congress Preempted Only Cautionary Statements on Labels and Advertisements, Controls the Preemption Issue in This Case.

The intent of Congress is the touchstone of preemption analysis. That intent may be explicitly stated in the statute or implied in its structure and purpose. *Cippolone v. Liggett Group*, 505 U.S. 504, 516 (1992).

Congress explicitly stated its intent

> to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health whereby (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C.§ 1331.

Reading the FCLAA as a whole, it is obvious that Congress was focused on the message content of tobacco advertising and labeling. This is clear from § 1333, which spells out in great detail the text and visual format of the required warnings. In *Cippolone, supra,* 505 U.S. at 517, this Court concluded that the preemptive scope of the FCLAA, both the 1965 and the 1969 versions, is governed "entirely by the express language of § 5 of each Act," and held:

> Thus, on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating *particular cautionary statements* on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b)).

Cippolone, supra, 505 U.S. at 518 (1992) (italic added). The Court also noted that this construction was required by the presumption against preemption of state police power regulations. *Ibid.* Billboard regulations are within the state police power. *Metromedia v. San Diego,* 453 U.S. 490, 498 n.7 (1981).

Notably, Congress imposed particular warning messages for billboard ads, § 1333(a)(3), but remained silent on the typical issues of local billboard control under the zoning and police powers, such as spacing, size, location, and illumination. Congress was obviously familiar with these elements of billboard regulation at the time the FCLAA was first adopted, since most of them are addressed in the Highway Beautification Act, 23 U.S.C. § 131, passed only three months after the original version of the FCLAA.

Congress clearly had the ability to restrict tobacco advertising by the medium as well as the message, for it forbade such promotion on any electronic medium subject to F.C.C. jurisdiction, 15 U.S.C § 1335. *Capital Broadcasting v. Mitchell*, 333 F.Supp. 582 (DDC, 1971) *aff'd mem. sub nom. Capital Broadcasting v. Acting Attorney General*, 405 U.S. 1000 (1972). The fact that Congress ignored all other media in the FCLAA reveals an intention not to preempt regulation of non-electronic media by other branches and levels of government.

The Seventh Circuit's analysis of the preemption question informs the legislative history:

> The Senate Report refers to § 5(b) as "narrowly phrased" and not intended to touch state authority over sales to minors, taxation, indoor smoking, or "similar police regulations." S. Rep. No. 566, 91st Cong., 2d Sess. (1969) *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663.

Federation of Advertising Industry Representatives v. City of Chicago, 189 F.3d 633, 638 (7th Cir., 1999).

Reading the FCLAA in terms of the "structure and purpose of the statute as a whole," *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), it is inescapable that Congress intended to preempt only message content of tobacco advertising *statements*, and to leave billboard location requirements in the discretion of state and local legislators.

II. THE MASSACHUSETTS REGULATIONS ARE CONSTITUTIONAL UNDER *CENTRAL HUDSON.*

A. Although Most Tobacco Advertising Is Psychologically Deceptive and Arguably Advocates Illegal Activity, the First Prong of Central Hudson Is Not a Workable Basis for Concluding That Speech Promoting Tobacco Is Totally Without First Amendment Protection.

In *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 566 (1980) the Court established a four step test for determining the constitutionality of restrictions on commercial speech. The first prong of the *Central Hudson* test is to determine whether the commercial speech qualifies for any First Amendment protection at all; if the message concerns illegal activity or is misleading, then there is no protection. *Central Hudson*, *supra*, 447 U.S. at 566. Tobacco advertising in general has often been criticized as intentionally deceptive,[2] since the ads typically associate tobacco with unrealistic, idyllic images. However, short of a national, total ban on all cigarette advertising,[3] "deceptiveness" is not a workable basis on which to judge potential First Amendment protection for tobacco advertising on billboards, because the task of evaluating each separate

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[2] See, for example, World Health Organization Press Release of 4 November 1999 entitled, "Nowhere to Run, Nowhere to Hide - WHO Launches Ground Breaking Global Campaign to Counter Tobacco Industry Deception," available on the internet at www.health.fgov.be /WHI3/krant/ krantarch99/ kranttekstnov/ 991109m01who.htm, and White, *Merchants of Death-The American Tobacco Industry*

[3] *See* Polin, Article: *Argument for the Ban of Tobacco Advertising, a First Amendment Analysis*, 17 Hofstra L. R. 99 (1988); and Blasi and Monaghan, *The First Amendment and Cigarette Advertising*, 256 Journal of the American Medical Association 502, 506-07 (1986), advocating a complete ban on all cigarette advertising.

tobacco ad for deceptiveness would place an unwieldy administrative burden on government officials.

The "concerning illegal activity" element is also problematic, for while tobacco is legal for adults, it is illegal for minors in every state. As memorably stated by U.S. District Court Judge William B. Young in his trial court decision in this case:

> CIGARETTE ADVERTISING IS FUNCTIONAL PORNOGRAPHY. The metaphor is apt. Both are entirely legal. Both are spawned by and supported by multi-billion-dollar industries generating significant economic activity. While ostensibly clucking in disapproval, millions of adult Americans support each industry with considerable cash outlays yet seek to have the government teach our children to avoid that which so many of us eagerly purchase.

Lorillard v. Reilly, 84 F.Supp.2d 180, 182 (2000).

B. Massachusetts' Regulations Serve Several Governmental Interests Which Are at Least "Substantial."

The second prong of *Central Hudson* asks if the regulation serves a substantial governmental interest. Massachusetts' ban on tobacco advertising near schools and playgrounds serves several interests which are "substantial" or stronger. The most obvious is the protection of children from harmful influences, and to diminish the risk that they will be persuaded to break the law by smoking before they have the legal right to make that choice. This Court has long recognized child protection as a governmental and family interest of the highest order. *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 743 (1996) (the court has often found "compelling" the need to protect children from exposure to patently offensive sexual material); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749, 750 (1978) (F.C.C. properly required broadcasters

to channel indecent broadcasts to times when children most likely would not be listening); *Ginsberg v. New York*, 390 U.S. 629 639-40 (1968) (state has an interest to see that children are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens.)

In only two of the Court's commercial speech cases has protection of children been offered as a justification, namely the harm caused by exposure to ads for contraceptives. *Carey v. Population Services International*, 431 U.S. 678 (1977), *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983). In *Bolger*, which concerned a national ban on ads for contraceptives by mail order, the Court noted that the ads were not intrusive and that the danger of incidental exposure was small. 463 U.S. at 74. Not so here; it is the very intrusiveness of billboards that make them attractive to advertisers. Furthermore, both *Bolger* and *Carey* concerned products related to exercise of a constitutional right, procreative freedom. In contrast, there is no constitutional right to smoke or chew tobacco, or even to sell it. Cf. *Mugler v. Kansas*, 123 U.S. 623 (1887).

The Massachusetts regulations also serve the substantial governmental interests in public health and reducing the enormous costs of treating tobacco-related disease, by reducing the numbers of children and teens lured into the tobacco habit.

Since it is illegal to sell tobacco to minors in Massachusetts,[4] the regulations here also advance that policy. In *U.S. v. Edge Broadcasting*, 509 U.S. 418, 425 (1993) this Court upheld regulations forbidding broadcast advertising of gambling on the ground that the speech restriction served to avoid undermining state policy against gambling.

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[4] Mass. G. L. ch. 270, 6.

The second prong of *Central Hudson*, a substantial governmental interest, is thrice satisfied in this case.

C. The Regulations Directly Advance the Substantial Interests in Protecting Children and the Public Health System by Reducing the Number of Children and Teens Lured into Becoming New Smokers.

The tobacco industry has long known that the best source for new buyers / addicts is youth, especially alienated and rebellious young people who seek some symbol of independence from parental and societal authority figures.[5] It is no wonder the industry is fighting for their neighborhood billboards; now that tobacco ads are banned from television and radio, billboards near schools and playgrounds provide the best opportunity recruit new customers. The FDA has estimated that 3,000 teenagers start smoking each day;[6] that translates into roughly one million new users per year, most of whom will become life-long addicts, customers who, by the physical imperative of the addiction mechanism, effectively lose their free choice about purchasing the product.

Tobacco addiction and the diseases it causes or worsens impose an enormous burden on the public health care system. Just last term this Court noted the FDA's findings that:

> more than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease. . . . the only way to reduce the amount of tobacco-related illness and mortality was to reduce the level of addiction, a goal that could be

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[5] See *Hooked on Tobacco: The Teen Epidemic*, 60 Consumer Reps. 142, 143 (1995)

[6] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,317 18 (1995) (proposed Aug. 11, 1995)

> accomplished only by preventing children and adolescents from starting to use tobacco. . . . 82% of adult smokers had their first cigarette before the age of 18, and more than half had already become regular smokers by that age. . . . children were beginning to smoke at a younger age, that the prevalence of youth smoking had recently increased, and that similar problems existed with respect to smokeless tobacco. . . [and that] if the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely ever to begin.

F.D.A. v. Brown and Williamson, 529 U.S. 120, 134 *et seq.* (2000).

Given the crucial role of advertising in luring new smokers, the undisputed fact of serious addiction caused by nicotine, and the devastating costs to the public health care system of treating tobacco-related illness, it is beyond question that reducing the number of new smokers by sharply limiting exposure of the enticing images to our most vulnerable citizens, serves substantial, even compelling, governmental interests.[7]

The third test of *Central Hudson*-advancing the substantial governmental interest—is met.

D. The Regulations Are Not More Extensive Than Necessary to Serve the Substantial Public Interests.

The tobacco companies argue that Massachusetts' ban on tobacco billboards within 1,000 feet of schools or

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[7] *See, generally*, Kessler: *A Question of Intent—A Great American Battle With a Deadly Industry*, New York, BBS Public Affairs (Perseus Books Group), 2001

playgrounds is excessive, and thus violates the final prong of *Central Hudson*, that the regulations be no more extensive than necessary, restated as "narrowly tailored to achieve the desired objective" in *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

It is debatable whether the exclusion zone should be 300 feet or 500 feet or 1,000 feet. However, this Court has long refrained from second guessing legislative judgments in this area, and should do so again here. *Metromedia v. San Diego*, 453 U.S. 490, 508, 509 (1981) (Court will not reject city's judgment to value on-site advertising over off-site); *Burson v. Freeman*, 504 U.S. 191, 210 (Court did not view the question of whether a 100-foot boundary could be more tightly drawn as being of constitutional dimension); *Hill v. Colorado*, 530 U.S. 703,120 S. Ct. 2480, 2495 (2000) (Court would accord a measure of deference to Colorado Legislature in adopting 8-foot interval).

The tobacco companies assert that the principles of *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), *Rubin v. Coors*, 514 U.S. 476 (1995), and *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) demand reversal here. Those cases are all distinguishable because the regulations totally banned purely factual information (alcohol pricing, alcohol content, prescription drug pricing) which adult consumers could use to make intelligent choices concerning products that were legal for them to buy. The regulations under scrutiny here do not impose a total ban, do not involve purely factual information, and are tailored to shield children from images enticing them to use a highly dangerous product which is illegal for them.

Nor may it be successfully argued that the tobacco companies are now foreclosed from presenting their message to adults. They remain free to purchase newspaper and magazine advertising, and frequently do so. They remain free to advertise on billboards which are not within 1,000 feet of schools or playgrounds.

> When young children are constantly and involuntarily bombarded with seductive messages appearing on neighborhood billboards that promote a lifelong addiction, not only is their health endangered, but their right to be free from having adult choices foisted upon them is not so subtly infringed.

Garner, Article: *Protecting Children From Joe Camel and His Friends: A New First Amendment Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479, 486 (1997).

Beyond the "purely factual information" distinction, *44 Liquormart, Rubin* and *Virginia Pharmacy* also differ on the issue of intrusiveness of the medium. Children rarely if ever read the small print on beer labels, or ads in newspapers for prescription drugs or liquor. But giant, full color, illuminated billboards near schools and playgrounds are visually unavoidable; their purpose is to arrest the viewers' attention, if only for a few seconds, and to implant in an impressionable young mind a powerful and persuasive visual image. Nearly seventy years ago this Court noted the highly intrusive nature of strategically placed billboards and placards. In upholding Utah's total ban on tobacco billboards, the Court said:

> The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.

Packer Corp. v. Utah, 285 U.S. 105, 110 (1932).

The Massachusetts regulations pass the final test of *Central Hudson*.

III. THIS CASE PRESENTS NO OCCASION FOR A MAJOR CHANGE TO THE COURT'S COMMERCIAL SPEECH DOCTRINE.

The advertising and retailing industries once again entreat this Court to abandon or seriously modify the commercial speech doctrine and the *Central Hudson* test. They make essentially the same arguments they presented only two terms ago in *Greater New Orleans Broadcasting Ass'n, Inc. v U.S.*, 527 U.S. 173 (1999). Once again, the Court's response should be:

> In this case, there is no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision.

527 U.S. at 184.

A. Our Cultural Respect for the Challengers Who Changed the Course of History Requires a Higher Level of Protection for Ideological Speech.

At the core of the tobacco companies' constitutional call is the question: "Why should our messages have less constitutional protection than political or religious speech? Advertising matters more to the common people than the great debates, and advertising provides information about products and services, and improves the efficiency of the economic system." Even if we assume these points, they show only that commercial speech is entitled to some protection, not that it deserves equal treatment under the First Amendment. This Court's wisdom has long stressed that the First Amendment protects, first and foremost, expression on matters of politics, religion, philosophy, the arts, science and cultural matters; in short, the marketplace of ideas and the search for truth.

The primary item in the marketplace of ideas is criticism of the government. It is not natural for a government to allow open criticism of its policies, simply because criticism can lead to a loss of popular support and thus to a loss of power. This sentiment was expressed by Lord Holt in *Rex v. Tuchin*, Holt 424 (1704):

> If men should not be called upon to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for every government, that the people should have a good opinion of it. . . . [Producing animosities as to the management of the government] has always been looked upon as a crime, and no government can be safe unless it be punished.

Quoted in Chafee, *Free Speech in the United States*, 180 (1941).

Our First Amendment turns Lord Holt's concept upside down, and converts the punishable crime of criticizing the government into a legal right of the first order.

Critics and dissidents of every kind find protection under the First Amendment. Even when we disagree with them, or find their messages revolting or incomprehensible, still we reserve a deep respect for idealists, protestors and crusaders whose quests for the more meaningful life, deeper insights into the mysteries of nature, more transcendent music, a more inspiring novel, or a more just political system leads them to decry and defy the norms of their time. Because some of the dissidents are eventually proven right, we hold in sometimes nervous reverence the right of all, crackpots and visionaries alike, to dissent from the established view. This profound respect for "your right to say it," is deep in our culture; our law reflects that cultural tradition, as it should.

> A special respect for individual liberty in the home has long been part of our culture and our law; that principle

> has special resonance when the government seeks to constrain a person's ability to speak there. Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8-by-11 inch sign expressing their political views.

Ladue v. Gilleo, 512 U.S. 43 (1994).

> [A] city council [may not] enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of city government.

R.A.V. v. St. Paul, 505 U.S. 377, 384 (1992).

B. This Court's Early Cases on Commercial Speech Clearly Laid the Foundation for Maintaining the Lower Level of Protection for Commercial Speech.

When this Court first extended First Amendment protection to advertising, it explained the reasons and social justifications for doing so. In *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) the Court explained the difference between ideological debate and expression on commercial matters:

> Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."
>
> * * * *
>
> Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas, and from truth, science,

> morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government that it lacks all protection. Our answer is that it is not.

425 U.S. at 761, 762 (internal citations and punctuation omitted). In the same case Justice Stewart commented, in words since quoted in countless of lower court opinions:

> [T]here are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. . . . Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decision-making, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. . . .
>
> Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the 'information of potential interest and value' conveyed, rather than because of any direct contribution to the interchange of ideas.

425 U.S. at 779-780.

Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978), gave the Court another opportunity to recognize the "common sense and legal distinction" between speech proposing a commercial transaction and other varieties:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First

> Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

436 U.S. at 456.

In *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980) the Court announced the now-classic four part test for the constitutionality of restrictions on commercial speech. The lead opinion said:

> Apparently the [Stevens concurrence] opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. . . . This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech.

447 U.S. at 563 n.5.

Metromedia v. San Diego, 453 U.S. 490 (1981), was the Court's first (and, until this case, only) decision on advertising billboard regulation in the commercial speech era. Given the different levels of protection for commercial and noncommercial speech, the plurality analyzed the two classes separately. The restrictions on commercial speech were validated (the city was free to value on-site commercial advertising over off-site commercial), while the restrictions on noncommercial speech (interpreted to mean that the city was favoring certain noncommercial messages over others, as well as favoring commercial over noncommercial in some

locations), were found unconstitutional by the plurality.[8] These concepts form the foundation for virtually all sign regulations in the nation today; abandoning or corroding them now would wreak havoc on the ability of state and local governments to protect the appearance of their communities through effective sign control.

C. The Fact That the Regulations Affect Only Tobacco Signs Does Not Invoke Strict Scrutiny.

In the arena of ideological speech, standard First Amendment analysis first asks if the regulation is content based. If it is, then strict scrutiny applies. *Burson v. Freeman*, 504 U.S. 191 (1992). If it is content neutral, then the time, place and manner rule applies. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). However, this technique of raising of the standard of review for content based distinctions generally has not been followed in the commercial speech cases. Rather *Central Hudson* has been applied in a manner substantially Similar to the time, place & manner test, which does not require "least restrictive means." *Fox, supra*, 492 U.S. at 477. For example, in *Metromedia v. San Diego,* 453 U.S. 490 (1981), the plurality decision indicated that the city was free to value some commercial speech over other expression in the same category, based on both locational and content factors:

> Second, the city may believe that offsite advertising, with its *periodically changing content*, presents a more acute problem than does onsite advertising. Third, San Diego has obviously chosen to value one kind of

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[8] The commercial speech analysis was supported by five votes, the plurality of four plus Justice Stevens. Justices Brennan and Blackmun concurred with the plurality's result for the noncommercial speech restrictions, but not the plurality's reasoning; Brennan and Blackmun would have invalidated the entire ordinance. *See Ackerley Communications v. City of Somerville*, 878 F.2d 513, 517 n.8 (1st Cir., 1989).

> commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising. . . . The city has decided that in a limited instance—onsite commercial advertising—its interests should yield. We do not reject that judgment.

453 U.S. at 511. Justice Stevens concurred in this portion of the plurality decision, 453 U.S. at 541.

While the *Metromedia* plurality found the San Diego sign ordinance invalid as to noncommercial speech, it did so in part because certain signs-religious symbols, commemorative placques, time and temperature displays, temporary political signs, etc.-were exempted from the general ban on noncommercial speech. To the plurality, these exemptions showed an impermissible favoritism to certain noncommercial messages. 453 U.S. at 514. However, on this point all five of the other justices disagreed with the plurality's reasoning, and said in essence that the exceptions to the general ban should make no real difference in constitutional analysis because they did not invoke concerns protected by the First Amendment. Justice Stevens said the plurality's focus on the exceptions from the general led it to conclude the ordinance is unconstitutional because it did not abridge enough speech, 453 U.S. at 540, that the neutral exceptions for certain noncommercial signs did not pose a threat to any interests protected by the First Amendment because they did not show that the government is trying to influence public opinion or limit public debate on particular issues, 453 U.S. at 554, and that the city's allowance of additional communication during political campaigns was consistent with the interests the First Amendment was designed to protect, 453 U.S. at 555. Chief Justice Burger called the exceptions "negligible," 453 U.S. at 562, and said they did "not remotely endanger freedom of speech," 453 U.S. at 564. Justice Rehnquist said he was generally in agreement with the Chief Justice, and added that the limited exceptions were of the types which do not render a statute

unconstitutional; he would have treated the exception for political season billboards as self-limiting and having an effect on esthetics only during campaign season. Justices Brennan and Blackmun said that the city's few exceptions did not alter the overall character of the ordinance as a total ban, 453 U.S. at 526.[9]

The *Central Hudson* case itself also noted that the strict scrutiny rule for content based distinctions, which applies in other contexts, does not apply in the commercial speech arena. 447 U.S. at 564 n.6. Justice Stevens noted in his concurrence in *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992), that the government may limit advertising for cigarettes but not cigars, citing to the very federal statute in issue in this case. He also stated:

> [O]ur decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment. [¶] This is true at every level of First Amendment law. In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity. . . .
>
> Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.

505 U.S. 377, 420. 422

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[9] In the 3rd Circuit, the theory of "site relevance" has supplanted the *Metromedia* plurality's analysis of exemptions from a general ban. *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Circ., 1994)

The Court has on several occasions reviewed categorical regulations under the *Central Hudson* analysis, without resorting to strict or exacting scrutiny. *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) and *Rubin v. Coors*, 514 U.S. 476 (1995) (liquor price advertising and alcohol content); *U.S. v. Edge Broadcasting*, 509 U.S. 418 (1993) and *Greater New Orleans Broadcasting Ass'n, Inc. v U.S.*, 527 U.S. 173 (1999) (broadcast advertising for gambling). These cases illustrate the flexibility of the *Central Hudson* test in adapting to a wide range of factual situations. *Fox, supra*. 492 U.S. at 476.

It is unnecessary and unwise to invoke strict scrutiny in commercial speech cases because *Central Hudson* allows a balancing of interests which considers the importance of the governmental interest, the degree to which the interest is served, and the tightness of the fit between means and ends. Invoking strict scrutiny for content based distinctions which are viewpoint neutral would destroy of the concept of the First Amendment's hierarchy of values; if any commercial speech were to be reviewed under strict scrutiny, then the entire concept of limited protection for commercial speech - and full protection for ideological speech - would be destroyed. The danger of "leveling" was pointed out by Justice Blackmun in his concurrence in *R.A.V. v. St. Paul*:

> If all expressive activity must be accorded the same protection, that protection will be scant. The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech. If we are forbidden to categorize . . . we shall reduce protection across the board.

505 U.S. at 415.

D. The Court's Recent Commercial Speech Cases Confirm That Central Hudson Is a Workable Test, Flexible Enough to Adapt to a Wide Range of Factual Situations.

In *Greater New Orleans Broadcasting Ass'n, Inc. v U.S.*, 527 U.S. 173 (1999) the Court insightfully answered the advertising industry's relentless tirade against the *Central Hudson* test:

> The four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three.

527 U.S. at 183, 184.

This concept—the integrated, interdependent nature of the four inquiries—is the key to maintaining *Central Hudson* as the controlling test in commercial speech cases, and to honoring the traditional hierarchy of values in First Amendment law.

E. A Significant Toughening of the *Central Hudson* Standard For Billboards Would Seriously Impede State and Local Government's Ability to Regulate Signs.

As an association of land use planners, the APA is most keenly concerned that this case might be used to raise the protection level for commercial speech and thus make it far more difficult for state and local governments to regulate signage. All across the nation, local policy makers and planners view sign regulation as one of their most effective tools for preserving and improving the appearance of their towns and cities.

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical,

> aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33 (1954).

> Regardless of the label we give it, we are discussing a very simple and basic question: the authority of local government to protect its citizens' legitimate interests in traffic safety and the environment by eliminating distracting and ugly structures from its buildings and roadways, to define which billboards actually pose that danger, and to decide whether, in certain instances, the public's need for information outweighs the dangers perceived.

Metromedia v. San Diego, 453 U.S. 490, 557 (Burger, C.J., dissenting) (1981).

Signs often set the visual tone of an area and thus determine a visitor's all important "first impression." Sometimes the total signage can dominate or even define the image, as shown by the Las Vegas strip or Times Square in New York City. But most cities try to avoid the garishness of Las Vegas or Times Square; they want a reasonable balance between the advertising and identification needs of their local business community and the esthetic concerns of their environmental, arts, historic and scenic constituencies.

> For street graphics to communicate effectively, they must be neither too large nor too small, neither too numerous nor absent altogether, neither too garish nor too bland.

Mandelker and Ewald: *Street Graphics and the Law*, p. 33 (1988, Chicago: APA).

To preserve state and local governments' flexibility to regulate signs in harmony with the local situation, the principle that commercial speech enjoys only a limited level

of protection under the First Amendment must be sustained once again. The *Central Hudson* test, as refined and adapted in the many cases applying it, is a time proven method for analyzing commercial speech regulations.

CONCLUSION

The challenged regulations are not preempted because Congress intended to address only *statements* about smoking and health; other than the broadcast ban - which shows that Congress knew how to regulated media as well as message - Congress did not intend to address media regulation issues, such as location of signs.

Given the severe impact on personal and public health caused by tobacco use, the high susceptibility of children to alluring images promoting a product which is illegal for them, and the visually intrusive nature of billboards, the subject regulations should be sustained under *Central Hudson*.

The *Central Hudson* test, and the hierarchy of values concept on which it is based, must be maintained to preserve our cultural tradition of higher respect for ideological speech. The principles of that case are crucial to allowing state and local governments the flexibility they need to regulate signs to serve the local esthetic interests.

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IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* CITY OF LOS ANGELES, AND THE CITIES OF BERKELEY, CAPITOLA, CARLSBAD, CHULA VISTA, HAWTHORNE, HAYWARD, HOLLISTER, INGLEWOOD, LAKEWOOD, LOS GATOS, MARTINEZ, MONTEREY, MOUNTAIN VIEW, OCEANSIDE, PALM DESERT, PALO ALTO, PLEASANT HILL, PLEASANTON, SACRAMENTO, SAN DIEGO, SAN FRANCISCO, SAN LUIS OBISPO, SAN MARCOS, SANTA CLARA, SANTA CRUZ, SARATOGA, TIBURON, TOWN OF DANVILLE, VICTORVILLE, THE COUNTY OF SAN FRANCISCO, AND THE LOS ANGELES COUNTY TOBACCO CONTROL ALLIANCE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus City of Los Angeles (the "City") adopted an ordinance in 1998 similar to that at issue in this case. That ordinance was based on detailed studies and factfinding by the City's Planning Department, extensive hearings before the City Council and City Planning Commission, and legal analysis by the City Attorney. The investigation confirmed the severity of underage smoking and a strong link to outdoor and storefront tobacco advertising.

The remaining *amici* are 30 local governments in California and one non-profit organization that share similar concerns, and have either passed similar ordinances, or wish to preserve the police power of local governments to take such action in the future. The local governments, their ordinances, and the organization are further described in Appendix A to this brief.

BACKGROUND

In April 1997, the City of Los Angeles began an extensive inquiry into ways to reduce underage smoking and drinking. The investigation lasted sixteen months, involved many public hearings, review of scores of studies and reports, and detailed analyses of the location and impact of billboards and signs advertising tobacco and alcohol products in Los Angeles. The resulting legislative record, summarized here,[2] demonstrated a powerful link between tobacco and alcohol

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[1] Pursuant to Rules 37.4 and 37.6 of this Court, each local goverment *amicus* states that submission of the brief is authorized by its authorized law officer, and all *amici* state that no party had any role in writing this brief, and that no party other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

[2] All citations in the Background are to materials in the Los Angeles legislative record, portions of which have been lodged with the Clerk.

advertising and underage smoking and drinking. To protect the welfare of minors and help enforce the ban on sales to minors, the City exercised its police powers to adopt an ordinance restricting such advertising in areas frequented by minors. See App. B.

A. Underage Smoking And Advertising

The record before the City showed that, despite California's century-old prohibition on sales of tobacco products to minors,[3] each year 75,000 underage Californians smoke their first cigarette; in Los Angeles County alone, 100 minors begin smoking each day.[4] Minors who try cigarettes first do so, on average, before they turn 15, and those who become daily smokers do so, on average, before they turn 18;[5] they also are far more likely to "move on to other drugs."[6]

The record also showed that tobacco use by California adolescents increased 31% between 1993 and 1995. *CPC Staff Report*, *supra* note 4, at 34. Nationwide, teen use soared

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[3] Cal. Penal Code § 308 (enacted 1891). Under § 308, it is unlawful to sell or furnish tobacco products to any person under the age of 18 years old; as amended in 1996, § 308 also makes it illegal for those under 18 to obtain, possess or control any tobacco product. *Id.*

[4] Los Angeles City Planning Dep't, CPC No. 97-0242 CA, CF No. 96-1632-S1, *Staff Report to the City Planning Commission, Re: Proposed Ordinances to Restrict the Advertisement of Tobacco and/or Alcoholic Beverages on Publicly Visible Signs Citywide or within 1,000 Feet of Certain Properties Frequented by Minors* 33 (Apr. 9, 1998) (hereinafter "*CPC Staff Report*") (citing California Healthy Cities Project Connections (1995)).

[5] U.S. Surgeon General, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 65 (1994) (hereinafter "*1994 Surgeon General Report*"), *cited generally in CPC Staff Report*, *supra* note 4, at 32.

[6] *CPC Staff Report*, *supra* note 4, at 33 (citing Columbia Univ. Ctr. on Addiction & Substance Abuse, *Comprehensive National Analysis Between Gateway Drug Use and Other Illicit Drug Use* (Oct. 29, 1994); *see id.* ("Youth who smoked tobacco were 19 times more likely to use cocaine.").

by one-third between 1991 and 1996, from 27.5% to 34.8%.[7] Most new smokers were teens: "Of the thousands of people who start smoking daily, 90 percent are under the age of 21; 60 percent are not even 16." *CPC Staff Report, supra* note 4 at 31.

National reports conclude that advertising contributes to underage smoking. *Id.* at 30-32. For example, studies of smoking initiation rates demonstrate that sharp increases in underage smoking have coincided with particularly effective tobacco advertising campaigns; indeed, a California study attributed 34% of all adolescent tobacco experimentation to advertising and promotional activities.[8] That study also found that "each year an additional 6,000 underage adolescents in Los Angeles County purchased cigarettes for the first time illegally because of the influence of tobacco advertising and promotional activities."[9] The study concluded that the influence of tobacco advertising "is much stronger than the influence of either peer smoking or family smoking. This association is more than a coincidence, and it meets all the criteria for attributing causality."[10]

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[7] Los Angeles City Planning Dep't, CF No. 96-1632-S1, *Revised Findings For Tobacco Advertising Ordinance as Amended and Adopted By Los Angeles City Council* 7 & n.34 (Sept. 9, 1998) (hereinafter "*Revised Findings*") (citing Centers For Disease Control figures reported in Mike Clary, *Teen-Driven Ad Campaign Puts Heat on Big Tobacco*, L.A. Times, May 8, 1998, at A1, A24-A25).

[8] *Revised Findings, supra* note 7, at 5-6, 13 (citing Pierce et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998)) (hereinafter "*Dr. Pierce Study*").

[9] *Hearing on Proposed Ordinance to Amend Chapter IV of the Los Angeles Municipal Code before the Los Angeles Planning and Land Use and Arts, Health and Humanities Joint Comm. Meeting* 24-27 (June 9, 1998) (Testimony of John Pierce, Ph.D., Professor of Cancer Prevention, Univ. of San Diego; former Chief Epidemiologist, Office on Smoking and Health, Surgeon General C. Everett Koop).

[10] *Id. See generally Dr. Pierce Study, supra* note 8.

Attracting minors is important to the tobacco industry. Minors are "the tobacco industry's primary source of new customers in this country, replacing adults who have either quit or died."[11] Internal industry documents reveal the importance of advertising in attracting new customers.[12] *Revised Findings*, *supra* note 7, at 6. A former tobacco company executive stated because "the fragile, developing self-image of the young person needs all the support and enhancement it can get . . . self-image enhancement has traditionally been a strong promotional theme for cigarette brands and should continue to be emphasized." *Id.* at 6-7. An internal document acquired from another company states: "'If the last ten years have taught us anything, it is that the industry is dominated by companies who respond most effectively to the needs of younger smokers.'"[13]

Studies also showed that restricting tobacco advertising decreases underage smoking. A New Zealand study found that greater governmental control over tobacco promotion

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[11] Roesler, *Operation Storefront: Youth Against Tobacco Advertising and Promotion* (1995) (hereinafter "*Operation Storefront*") (quoting David A. Kessler, former commissioner of the FDA), *cited in Revised Findings*, supra note 7, at 16 n.81.

[12] Because "[t]eens actively search for cues from their peers and from advertising for the 'right' way to look and behave . . . ," adolescents are particularly susceptible to cigarette advertising. John Giglio, MA, JD, *How Tobacco Company Advertising Influences Minors to Use Tobacco: A Summary of Independent Research and Internal Industry Documents*, Am. Cancer Soc'y, May 20, 1996, at 7, *cited in Revised Findings*, *supra* note 7, at 7 & n.30. The tobacco ads portray tobacco use as "desirable, socially approved, safe and healthful, and widely practiced behavior among young adults," *id.*, leading teens to believe "smoking may enhance [their] self-image," *Revised Findings*, *supra* note 7, at 6.

[13] FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 60 Fed. Reg. 41313, 41331 (Aug. 11, 1995) (to be codified at 21 CFR Pts. 801, 803, 804, and 897) (hereinafter "*FDA Proposed Rule*"), *cited generally with approval in Revised Findings*, *supra* note 7.

increases the annual average decline in tobacco consumption and the rate of decline in underage smoking. A British study also found that restrictions on advertising tend to decrease tobacco use beyond what would have occurred in the absence of such restrictions. An in-depth analysis found that advertising restrictions in four western European countries also led to a reduction in tobacco consumption. Thus, in countries where advertising is banned or severely restricted, the percentage of minors who smoke has decreased more rapidly than in countries where promotion is less restricted.[14]

B. Billboards And Signs Posted Near Minors

Outdoor tobacco advertising is pervasive and unavoidable. It is "seen by everyone that goes out of the house to work, shop, or play. . . It can't be shut off, tuned out, thrown in the trash . . . . [It] offers constant reinforcement of the advertising message with a bombardment of imagery."[15] Children, particularly those in minority communities, are inundated with outdoor tobacco advertising on their way to school, in their neighborhoods, and in parks, and parents cannot limit exposure to these advertisements. *Revised Findings*, *supra* note 7, at 5, 16 n.80.

Local reports also showed that billboards and storefront signs were often located near schools and paths to schools. One report showed that 80.3% of billboards in three large neighborhoods were within five blocks of a school. *Id.* at 3. A second showed that signs in stores within two blocks of schools in another area were located at children's eye-level. *Id.* A third echoed these findings and attached photographs of storefront windows, including one in front of an elementary

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[14] The findings of the New Zealand, Great Britain, and Western European studies are set forth in Giglio, *supra* note 12, at 17-18, *cited in Revised Findings*, *supra* note 7, at 7 n.30.

[15] Marketing Ad Ventures, *Why Advertise Outdoor?*, *at* http://www.adsoutdoor.com/outdoor.html (last visited Mar. 9, 1998), *cited in Revised Findings*, *supra* note 7, at 3 & n.6.

school that advertised "School Supplies" in the middle of a large sign advertising Marlboro cigarettes. *Id.* & n.9.

The placement of such advertising does not appear to be coincidental. California reports showed that stores within 1000 feet of schools displayed a higher number of cigarette ads and promotions that were visible from the outside than stores beyond this radius. Half of the ads were displayed at a height of no more than three feet. And half of the stores near schools placed tobacco ads next to candy displays.[16]

The City Planning Department prepared detailed maps and analyses pinpointing the location of billboards to assess the relative effect of restrictions on tobacco billboard advertising at various distances (ranging from 500 to 2000 feet) from the areas where minors spend most of their time. The study concluded that barring tobacco advertising within 1000 feet of these areas was both necessary and sufficient to insulate minors. Such a limit did not include roughly 8,100 acres, or 37%, of industrial planned use areas and 23% of current industrial use areas.[17] It was also consistent with federal law (*e.g.*, 21 U.S.C. § 860, which penalizes drug activity within 1000 feet of schools); state law (*e.g.*, California, which bans tobacco billboards within 1000 feet of schools); and FDA findings (that standard billboard lettering (12-24 inches in height) can be read at distances of 1000 feet). *Revised Findings*, *supra* note 7, at 16.

C. The Los Angeles Ordinance

Ultimately, the City concluded—like Massachusetts and dozens of other communities in California and across the

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[16] The California reports and findings stated above are set forth in *Operation Storefront*, *supra* note 11.

[17] *CPC Staff Report*, *supra* note 4, at 22-23; *see also* Los Angeles City Planning Dep't, CPC No. 97-0242 CA, CF No. 96-1632-S1, *Billboards Interim Report: A Citywide Study of Off-Site Signs* 5-12 (Jan. 21, 1998); *Revised Findings*, *supra* note 7, at 21.

country—that a regulation designed to sever the link between publicly visible tobacco advertising and underage smoking was needed to deter minors from illegally purchasing and using tobacco. In 1998, the City enacted an ordinance "to promote the welfare and temperance of minors by reducing their exposure to certain publicly visible advertisements of . . . tobacco products in areas where children and youth are known to frequent." *CPC Staff Report*, supra note 4, at 3. The ordinance prohibits: (1) advertising, including off-site signs or billboards, in "publicly visible locations within 1000 feet of any residential zone, residential use, school, religious institution, entertainment park, youth center, or public park or playground"; and (2) on-site signs "placed within three feet of any window or door in such a manner that it is visible from outside the building" (hereinafter the "Los Angeles Ordinance").[18]

The Los Angeles Ordinance reflects the City's conclusion that attacking demand would be an effective complement to other efforts to enforce the ban on sales to minors. Despite efforts to improve enforcement of the ban, such as federal regulations adopted in 1996, studies showed that 70% of minors who tried to buy tobacco were able to do so. Even in towns that performed tobacco stings, 58% of minors were able to buy tobacco. And in three Massachusetts towns where enforcement made illegal sales less frequent, tobacco use among high school students increased.[19]

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[18] Los Angeles, California, Ordinance 172212 (1998), reproduced in Appendix B hereto. The distance specified is the horizontal measure in a straight line from the property line of one of the above-discussed areas. *Id.* The Los Angeles Ordinance predates the Master Settlement Agreement, covers signs excluded by the MSA (*e.g*, those smaller than 14 square feet or large signs sponsoring an event and placed outside the event site), and contains a number of limitations. *Id.*

[19] *See* B.J. Feder, *Youth-Smoking Study Sees Little Effect in Sting Efforts*, N.Y. Times, Oct. 9, 1997, at A5, *cited in Revised Findings*, *supra* note 7, at 7 n.32 .

The tobacco companies' voluntary educational programs for merchants and their customers have likewise failed to reduce underage smoking. Despite these programs, in over thirteen studies of over-the-counter sales, approximately 67% of minors were able to purchase cigarettes illegally. Other attempts to reduce sales of tobacco to minors through educational programs for retailers have not been very effective.[20] One study found that minors were able to buy cigarettes in 73% of stores receiving informational packages on preventing illegal sales to minors.[21]

Finally, the ordinance leaves open ample alternative means of advertising tobacco to adult consumers who may lawfully purchase such products. The Federal Trade Commission reported that the tobacco industry spent over $5 billion on advertising and promotional expenditures in 1996, with only 5.7% of this money devoted to outdoor billboard advertising.[22] Thus, the ordinance "provides multiple and adequate opportunities for . . . [tobacco] advertising, while still promoting the welfare and temperance of minors." *Revised Findings*, *supra* note 7, at 22.

SUMMARY OF ARGUMENT

Cities of all sizes throughout California confront a common and urgent problem: the demand for and use of tobacco products by minors. This demand is fueled in significant part by pervasive tobacco advertising that parents cannot screen

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[20] Giglio, *supra* note 12, at 16-17, *cited in Revised Findings*, *supra* note 7, at 7; *see also FDA Proposed Rule*, 60 Fed. Reg. at 41322 & n.5 (citing *1994 Surgeon General Report*, at 249).

[21] *FDA Proposed Rule*, 60 Fed. Reg. at 41322 & n.9 (citing Feighery et al., *The Effects of Combining Education and Enforcement to Reduce Tobacco Sales to Minors*, 266 JAMA 3168-71 (1991)).

[22] Federal Trade Comm'n, *Report to Congress for 1996* (issued in 1998), *cited in Revised Findings*, *supra* note 7, at 6.

and minors cannot avoid. Neither federal law nor the First Amendment prevents cities from addressing this problem.

Congress did not preempt the police power of States and localities to adopt measures in aid of long-standing bans on sales to minors. The language, purpose, and history of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (the "Act"), show that Congress left untouched the States' historic police powers to discourage tobacco sales to minors and control the location of advertising. This Court has already rejected the sweeping statutory construction urged by petitioners, which overlooks both the ambiguity in the language defining the Act's reach, as well as the traditionally narrow scope of preemption of state police powers. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) (plurality).

Nor do restrictions on tobacco advertising such as those Massachusetts has adopted violate the First Amendment. These regulations apply to unavoidable advertising of a product that is illegal to sell to minors in all 50 States, yet they leave open numerous alternative means of advertising this product to adults–including those promotional vehicles that receive the lion's share of advertising dollars. As a result, the regulations do not raise the concerns about "offensive paternalism" or "complete bans" on truthful commercial speech concerning "lawful" products that have led members of this Court to question whether strict judicial scrutiny of commercial speech restrictions is warranted. Rather, these regulations directly further the States' police power to ban certain sales and to regulate the integrity and fairness of commercial activity, while leaving advertisers ample access to adult consumers.

ARGUMENT

I. THE REGULATIONS ARE NOT PREEMPTED.

Petitioners and their *amici* argue that the preemption inquiry here is governed solely by the "plain language" rule.

They contend that § 5(b) has a plain meaning that necessarily preempts the Massachusetts regulations. Pet. Br. at 14-16, 18; PLAC Br. at 3-8; Washington Legal Foundation Br. at 10-17. They roundly criticize the appellate courts that have concluded otherwise for looking to the statutory framework, purpose, and history. *Id.*

Petitioners are wrong for two reasons. First, the language of § 5(b) is ambiguous in several respects; accordingly, the purpose and history of the Act must be examined to resolve these ambiguities. See *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 417-19 (1998). Second, a "clear and manifest" statement of Congressional intent is required to preempt the States and Localities from exercising their traditional police powers. In construing § 5(b) in *Cipollone*, this Court considered the very materials that petitioners now claim the appellate courts were forbidden to examine. Those materials led this Court to conclude that § 5(b) was intended to preserve, not preempt, the States' authority to exercise their traditional police powers. And that determination compels the conclusion here that States and Localities may exercise their police powers to regulate the location of advertisements that urge minors to purchase cigarettes in violation of State law.

A. Section 5(b) Is Ambiguous.

Petitioners claim that because the words "with respect to . . . advertising" are unambiguous, the Massachusetts regulations, which pertain to "advertising," are preempted. Petitioners cast their gaze too narrowly. Section 5(b) preempts any "requirement or prohibition based on smoking and health . . . imposed under State law . . . with respect to . . . advertising or promotion." "[E]ach phrase within that clause limits the universe of [State measures] pre-empted by the statute." *Cipollone*, 505 U.S. at 524. Determining the pre-emptive scope of § 5(b) thus requires consideration of the terms "requirement or prohibition" and "based on smoking and health."

Petitioners construe the terms "[n]o requirement or prohibition" in § 5(b) in isolation, and assert that they cover all requirements or prohibitions pertaining to advertising. But the plain meaning of a statute must be derived by examining the statute as a whole, and "a word 'gathers meaning from the words around it.'" *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 702 (1995) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see also *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 576 (1995). Here, § 5(a) uses the verb form of "requirement" twice: it provides that "[n]o statement relating to smoking and health, other than the statement *required* by section 1333 of this title, shall be *required* on any cigarette package." 15 U.S.C. § 1334(a) (emphasis added). Thus, § 5(a) bars only those "requirements" that regulate advertising content—*i.e.*, required statements on packaging that relate to smoking and health. See Pet. Br. at 19 (conceding that "subsection (a) . . . uses language referring explicitly to content, limiting its preemption to laws or regulations that require 'statements on packages.'"). Because the word "requirement" in § 5(b) is properly understood to draw meaning from Congress' use of the root-verb "require" in § 5(a), it is reasonably read to preempt only those "requirements" that regulate the content of tobacco advertising. See *Gustafson*, 513 U.S. at 575-76. It follows logically that the term "prohibition" is similarly limited.[23] This reasonable reading of § 5(b) alone justifies an examination of the Act's history and purpose to determine whether Congress intended to preempt only those measures that regulate the content of tobacco advertising, rather than all advertising-related requirements.

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[23] This reading gives effect to the 1969 amendments, which broadened the reach of § 5(b). The original version barred only regulations that mandated certain content in advertising; the amended version prohibits all regulations of content, including, for example, those that would prohibit use of cartoons.

Similarly, the term "based on smoking and health" also lacks a single plain meaning. The ambiguity lies in the extent to which, to be preempted, a statute must be "based on smoking and health." Must a statute be based *exclusively* on a concern for "smoking and health"? Or is it enough that it be based *principally*, or even *slightly*, on such a concern? And what about a statute originally enacted for non-health purposes that could now be said, given current scientific concerns, to be supported by a health rationale? The seriousness of this ambiguity is demonstrated by the three separate opinions in *Cipollone*, each defining "'based on smoking and health'" at a different "level of generality." See 505 U.S. at 529 n.27 (plurality opinion, discussing differences). This ambiguity on the face of § 5(b) also requires resort to the very constructive aids to which petitioners object.

B. "Clear and Manifest" Congressional Intent Is Required To Preempt Cities From Exercising Their Traditional Police Powers.

Petitioners also overlook a second important consideration. The consideration of preemption issues "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action . . . particularly in . . . 'a field which the States have traditionally occupied'" reflects the fact that "the States are independent sovereigns in our federal system." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996).

A majority of this Court applied these principles in *Cipollone*, 505 U.S. at 516, the only prior case in which this Court considered the meaning of § 5(b). Seven members of the Court agreed that "the presumption against the preemption of state police power regulations . . . reinforces the appropriateness of a narrow reading of § 5." *Id.* at 518. Thus, the *Cipollone* plurality considered the statutory text,

framework, purposes, and legislative history, and concluded that § 5(b) does not preempt state fraud and conspiracy claims that might be said to be "'based on smoking and health.'" *Id.* at 529. Even though the thrust of these claims was that the tobacco companies had lied about the health consequences of smoking, the plurality reasoned that the claims were based upon an obligation—the "duty not to deceive"—that was "more general" than "smoking and health," and that the claims posed no threat to national uniformity in the content of packaging, advertising, and promotional materials. *Id.* at 528-29. Three other justices considered these same materials in concluding that § 5(b) preempted none of the common law claims. *Id.* at 539-40 (concurring).

In *Medtronic*, a majority of the Court confirmed that determining the scope of express preemption turns ordinarily on the statutory framework, purposes, and history. Even with an express preemption provision, the Court "must nonetheless 'identify the domain expressly pre-empted' by th[e] language." 518 U.S. at 484. The goal in every case is to determine the actual purpose of Congress, which is "the ultimate touchstone," consistent with the "presumption[]" against preemption of "'the historic police powers of the States.'" *Id.* at 484-85. And that intent is to be discerned from the statutory "text," the "'statutory framework,'" and "the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law." *Id.* at 486. Thus, in construing the preemptive scope of § 5(b), the Court should consider the constructive aids that petitioners would prefer go unexamined.

C. *Cippolone* Concluded That Congress Intended § 5(b) To Preserve, Not Preempt, The States' Exercise Of Their Traditional Police Powers.

This Court has already determined that the term "based on smoking and health" does not have the broad, expansive meaning petitioners and their *amici* implicitly impute to it. To the contrary, the statutory framework, purposes, and

legislative history establish that "Congress intended the phrase 'relating to smoking and health' . . . to be construed narrowly, so as not to proscribe the regulation of deceptive advertising," even though, at a certain "level of generality," a false advertising claim could be regarded as being based on "'smoking and health.'" *Cipollone*, 505 U.S. at 529 & n.27 (plurality); *id.* at 539-40 (concurring).

The legislative history of the 1969 Act was instrumental in this analysis, because in it Congress "plainly expresse[d] an intent to preserve the 'police regulations' of the States." *Id.* at 529 n.27. After emphasizing its "narrow" preemptive scope, the Senate Report states that § 5(b) "'would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations.*'" *Id.* at 529 n.26 (omission in original) (quoting S. Rep. No. 91-566, at 12 (1969)).

Nothing in the text of the Act suggests any contrary intent. The "purpose" of the Act is "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health . . . ." 15 U.S.C. § 1331. That purpose is to be accomplished by "adequately inform[ing the public] about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes," while protecting commerce from being "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." *Id.*

The Act's structure, purpose, and history thus leave no doubt that Congress intended to preempt only those "requirements and prohibitions" affecting the content of tobacco advertising and labeling. Congress did not intend the Act to address the problem of minors who, under federal and State law, lack the capacity to make an informed decision to buy cigarettes under *any* labeling scheme. Thus, read "fairly

but narrowly," the Act evinces no Congressional intent to preempt States from using their police powers to adopt restrictions that regulate the placement, but not the content, of tobacco advertising in order to reduce demand for tobacco sales to minors that the States have directly prohibited.

D. The Massachusetts Regulations Are Traditional Police Power Measures Regulating The Location Of Outdoor Advertisements And Supporting Its Longstanding Ban On Cigarette Sales To Minors.

The Massachusetts regulations challenged here are even more clearly outside the domain preempted by § 5(b) than were the State law claims that survived preemption in *Cipollone*. Like those fraud claims, the regulations here rest on traditional police powers that long predate contemporary concerns about smoking and health. For example, they reflect one of the most general forms of the police power—the power to zone. It is well-established that "zoning restrictions on the sizes and placement of outdoor advertisements are well within the police power of states and municipalities." *Federation of Adver. Industry Representatives, Inc.* v. *City of Chicago*, 189 F.3d 633, 639 (7th Cir. 1999) (citing *St. Louis Poster Adver. Co.* v. *City of St. Louis*, 249 U.S. 269, 274 (1919)), *cert. denied*, 529 U.S. 1066 (2000). The power to "ban[] the outdoor advertisement of cigarettes is within that power." *Id.* (citing *Packer Corp.* v. *Utah*, 285 U.S. 105, 108-10 (1932)). Because the regulations here further a traditional police power of the states, the "'clear and manifest'" Congressional purpose required to preempt is absent. *Cipollone*, 505 U.S. at 516.

The regulations also further the traditional police power of protecting the welfare and moral development of minors. California first banned cigarette sales to minors in 1891, more than a half-century before the medical discoveries that support current health concerns about cigarettes. Cal. Penal Code § 308. The original California statute, which prohibited selling to anyone "under the age of sixteen years, any

tobacco, or preparation of tobacco" (1891 Cal. Stat. ch. 70, § 1, at 64), was codified as part of a chapter of the Penal Code containing offenses "Against Good Morals" Cal. Penal Code, pt. 1, tit. 9, ch 7, that bars selling alcohol to minors, or permitting minors to attend cockfights or to enter brothels. *Id.* §§ 307, 309 and 310. The moral obligation not to exploit the immaturity and vulnerability of minors, like the "duty to not to deceive," predates and "is more general" than the issue of "smoking and health." *Cipollone*, 505 U.S. at 528-29.

Massachusetts likewise has a long-standing law "which prohibits the sale of tobacco products to minors." *Consolidated Cigar Corp.* v. *Reilly*, 218 F.3d 30, 43-44 (1st Cir. 2000); see Mass. Gen. Laws Ann. ch 270, § 6 (West 2000). Ensuring compliance with the law barring tobacco sales to minors and concern for health were the two justifications upon which the Massachusetts Attorney General relied in promulgating the regulations. Mass. Regs. Code tit. 940, §§ 21.01, 22.01. In enacting its similar ordinance, the City of Los Angeles found that "tobacco [is] not a legal product for consumption by minors and therefore should not be advertised . . . where children frequent . . . ." See note 7 *supra*.

State laws designed to prevent sales to minors are consonant with Congressional intent not to "'affect the [traditional police] power of any State . . . with respect to . . . the sale of cigarettes to minors.'" *Cipollone*, 505 U.S. at 529 n.26. Thus, the California Supreme Court ruled that the Act does not preempt an action to enjoin as unfair cigarette advertising directed to minors. *Mangini* v. *R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 80 (Cal. 1994). Relying on the same passage of the 1969 Senate Report quoted in *Cipollone*, it reasoned that "[i]f Congress did not intend to affect the power of the state 'with respect to' the sale of cigarettes to minors, surely [§5 (b)] does not preempt attempts to prohibit the advertising of cigarettes directed at minors." *Id.* at 81.

Medtronic faithfully applies this Court's "clear and manifest" intent standard. Congress has given no indication that it intends to preempt the States when they legislate in furtherance of both their traditional police powers and a concern for health. To the contrary, the legislative history indicates that Congress intended to preserve the States' ability to enforce their police power to ban underage smoking. Thus, even assuming that a local statute rests on a health concern as well as on a police power concern for the morality and welfare of minors, that statute is still not preempted.

Finally, the Massachusetts regulations do not threaten the Congressional goal of ensuring national uniformity in the content of tobacco labeling, advertising, and promotional materials. Unlike the fraud claims in *Cipollone*, upheld even though they did regulate the health-related content of cigarette advertising and promotion, the regulations here are far less restrictive; they impose no content-related obligations, health-related or otherwise, on such advertising. Rather, they regulate the location of the advertising. Although there are variations in such location regulations, local zoning ordinances also vary in myriad other ways applicable to all advertisements. Variation in local zoning ordinances is a longstanding feature of American law with which tobacco companies, no less than other advertisers, have long had to contend, and Congress nowhere exempted them from compliance with this venerable local police power.

Massachusetts thus may permissibly regulate the location of billboards and signs that, when read by minors, propose the commission of an act made illegal by the State under its police powers. Its regulations further two traditional police powers—zoning and concern for the morality and welfare of minors—that Congress intentionally exempted from the preemptive scope of § 5(b), and that pose no threat to the purposes of the Act.

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT.

The regulations adopted in Massachusetts, like the Los Angeles Ordinance and other comparable laws, have been carefully designed to help enforce the ban on sales of tobacco to minors while leaving open ample alternative means of advertising tobacco products to adults. These restrictions therefore lack the features ("complete ban," "offensive paternalism") that have prompted calls for strict scrutiny of commercial speech restrictions, and fully satisfy the lesser scrutiny that should be applied here.

A. The Regulations Should Not Be Subject To Strict Scrutiny.

Relying on dicta in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), petitioners argue that commercial advertising is entitled to full constitutional protection unless it is false or misleading. Seeking strict scrutiny review, they claim Massachusetts' law is a blanket ban on truthful, non-misleading commercial speech that does not serve the only permissible basis for regulating such speech—protecting the "fairness and integrity of commercial transactions." Pet. Br. 28. This argument misconceives the justification for affording commercial speech constitutional protection. Even if the premise underlying petitioners' argument were not mistaken, moreover, that argument still fails on its own terms.

1. The Regulations Do Not Impair The Societal Interests That Justify Constitutional Protection Of Commercial Speech.

The reason advertising enjoys constitutional protection is to protect consumers' interest in the "'free flow of . . . information.'" *First Nat. Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764

(1976)),[24] not the self-expression of vendors.[25] Indeed, it is concern for the free flow of information that underlies the Court's hostility to regulations that are based on the "paternalistic" belief that people will "respond 'irrationally' to the truth." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 498, 504 (1996) (plurality) (quoting *Linmark Assocs.* v. *Township of Willingboro*, 431 U.S. 85, 96 (1977)). States can ban false or misleading advertising because it does not serve the societal interests that justify constitutional protection of commercial speech. This is not, however, the *only* commercial speech that can be restricted.

Truthful, nonmisleading commercial speech can be banned when it promotes an unlawful sale. See *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 183 (1999).[26] Such speech also can be restricted when it targets a vulnerable audience. In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), this Court upheld a ban on speech that was also

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[24] *See Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (constitutional protection of commercial speech "is based on the informational function of advertising"); *see also Edenfield* v. *Fane*, 507 U.S. 761, 766 (1993) (constitutional protection of commercial speech "safeguard[s]" the "societal interests in broad access to complete and accurate commercial information"); *Bates* v. *State Bar*, 433 U.S. 350, 364 (1977) (commercial speech protection serves society's interest in "informed and reliable decisionmaking"); *cf. Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

[25] The First Amendment's concern for speakers does not extend to advertisers because their "hardy" speech is not "'susceptible to being crushed by overbroad regulation,'" *Central Hudson*, 447 U.S. at 564 n.6 (quoting *Bates*, 433 U.S. at 381), and is not "necessary to ensure that a democratic state remains responsive to the views of its citizens" or otherwise "valuable [to] democratic self-determination." R. Post, *The Constitutional Protection of Commercial Speech*, 48 UCLA L. Rev. 1, 4 (2000).

[26] *Amici* endorse the extended development of this argument in the separate *amicus* brief filed in this case by the City of Oakland, California.

conceded to have been truthful and that did not mislead those who heard it. See *id.* at 468 (noting absence of "proof or findings of harm or injury"). The State could restrict this truthful, nonmisleading commercial speech, the Court concluded, because society's interest in the free flow of information does not apply when the speech is directed at a vulnerable segment of society that is "especially incapable of making informed judgments or of assessing and protecting their own interests." *Id.* at 467.[27] That is the situation here.

Massachusetts, like every other State, has concluded that minors are too immature to decide whether to smoke and has therefore prohibited the sale of tobacco to minors.[28] A wealth of evidence demonstrates, moreover, that the image-laden appeals of tobacco advertising entice minors to try tobacco by distorting their assessment of the risk. This advertising "leads youths to overestimate the prevalence of smoking and to consider smoking as normative," and youths who form these views are more likely to smoke than others. *1994 Surgeon General Report* at 192-94.[29] Outdoor and point-of-sale signs like those targeted here are particularly likely to convey the message that smoking is prevalent, because they "have more permanence than magazine ads, allowing multiple incidental exposures for all ages of persons who are on the

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[27] This Court has upheld other restrictions on truthful, nonmisleading commercial speech. In *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), the Court sustained a ban on speech that posed no threat to the "fair bargaining process," but instead caused "outrage and irritation" detrimental to the legal profession's reputation. *See id.* at 631.

[28] *See* Garner & Whitney, *Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479, 498 & n.103 (1997).

[29] *See also supra* at 3 (citing evidence linking advertising to underage smoking). This Court has relied on comparable evidence in First Amendment cases. *See Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 744-45 (1996) (plurality) (evidence concerning viewing habits of children).

neighborhood streets regularly, going to work, stores, or schools." *Id.* at 183; see *supra* at 5-6.

Thus, however truthful and nonmisleading petitioners' advertising may be to adults, society has no interest in ensuring that this information flows freely to minors who may not lawfully purchase the product and who lack the sophistication to assess the value of the speech. See *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) ("the law has generally regarded minors as having a lesser capability for making important decisions"); *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (States may conclude that, in some areas, "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees" (footnote omitted)). Petitioners' truthful commercial speech "more often than not will be injurious to" this audience, which society has long recognized is "especially incapable of making informed judgments or of assessing and protecting their own interests." *Ohralik*, 436 U.S. at 466, 467. A regulation that restricts the flow of otherwise truthful commercial speech to an audience that is especially vulnerable and to whom the product may not lawfully be sold should not be subjected to strict scrutiny review, because such a law does not undermine the societal interest in the free flow of commercial information that justifies constitutional protection of commercial speech in the first place.

2. The Concerns That Prompted Calls For Stricter Review Of Commercial Speech Restrictions Are Absent Here.

Even if all truthful, nonmisleading speech were entitled to "full" First Amendment protection, petitioners' claim for strict scrutiny of these commercial speech restrictions would still fail. To address the profound problem of underage smoking, States and Localities have *not* employed blanket bans on speech. They also have not manipulated the choices of legal users of a product for reasons unrelated to preserving

a fair bargaining process. Rather, they have enacted limited speech restrictions as adjuncts to a sales prohibition. They thus have targeted commercial speech that is unavoidable for those (minors) who may not lawfully purchase the products at issue and cannot fairly assess the value of the advertisers' speech. No member of the Court has called for strict scrutiny of such a responsible exercise of State and Local police powers, and such review would be wholly inappropriate.

While petitioners invoke the specter of "'blanket ban[s]'" and "wholesale suppression[s]," Pet. Br. at 33, 38, the regulations do not constitute a blanket ban, and thus do not give rise to the "special dangers" that the plurality in *44 Liquormart* suggested would warrant strict scrutiny. 517 U.S. at 502.[30] The regulations leave open numerous alternative means of advertising tobacco to adults. Indeed, petitioners' billboard and outdoor advertising accounted for a mere 5.7% of the industry's more than $5 billion in 1996 advertising and promotional expenditures. See *supra* at 8. These regulations pose no danger of driving petitioners' particularly "hardy" speech from the market.[31]

Nor do the regulations "obscure an 'underlying governmental policy,'" and thereby "impede debate over central issues of public policy." 517 U.S. at 503 (plurality) (quoting *Central Hudson*, 447 U.S. at 566 n.9). Like almost every other State, Massachusetts has openly barred the sale of

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[30] *See* 517 U.S. at 500 (plurality) ("special concerns arise from regulations that *entirely suppress* commercial speech) (internal quotation marks omitted); *id.* ("'special care' should attend the review of . . . *blanket bans*"); *id.* at 502 (plurality) ("special dangers . . . attend *complete bans* on truthful, nonmisleading commercial speech") (all emphases added).

[31] Petitioners refer to an "unfolding regulatory regime" and "unchecked suppression," Pet. Br. at 34, but their speculation about possible future regulations provide no basis for treating partial prohibitions as total bans.

tobacco products to minors, and it openly discourages underage use.[32]

Similarly, the regulations are not an exercise in "offensive" paternalism. Minors who frequent parks, playgrounds, schools, and establishments around such areas cannot fairly "'assess the value of the information presented'" in tobacco advertising. See *id.* at 504 (plurality). The protection of children is a virtue and, indeed, an obligation of the State. This protection does not cut off adults from access to tobacco advertising through other means and in other areas.

Finally, petitioners' extended reliance on *R.A.V.* is misplaced. The State has selectively restricted tobacco advertising on a basis directly related to "the characteristics of commercial speech" that, even on petitioners' narrow view, permit the States to regulate such speech. *R.A.V.*, 505 U.S. at 388-89; see Pet. Br. 29-30, 34. This is not a case where, for example, the State has barred truthful advertising of a product that may lawfully be sold to minors (*e.g.*, Barbie dolls) because of a concern unrelated to the "characteristics of commercial speech" (*e.g.*, a concern that such toys are

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[32] Contrary to petitioners' claim, the State's anti-smoking policy does not convert its regulations into impermissible viewpoint discrimination any more than an anti-drug policy would taint a ban on advertising of illegal drugs. Image-laden advertisements that favorably portray tobacco are not "advocacy materials.'" Pet. Br. at 39 (quoting *Meese* v. *Keene*, 481 U.S. 465, 480 (1987)). As this Court has made clear, even "advertising which 'links a product to . . . public debate,' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985). Because petitioners "enjoy the full panoply of First Amendment protections for their direct comments on public issues[,] . . . [t]here is no reason for providing similar constitutional protection[s]" to their advertising. *Central Hudson*, 447 U.S. at 563 n.5. The opportunities for public comment, as well as alternative means for advertising to adults, belie petitioners' hyperbolic claim that their viewpoint will be lost to the marketplace and that "'official suppression of ideas is afoot.'" Pet. Br. at 39-40 (quoting *R.A.V.*, 505 U.S. at 390).

"demeaning"). *R.A.V.*, 505 U.S. at 388-89. Rather, these restrictions are "'linked inextricably' to . . . transactions" that the State not only has "the power to regulate" but *has* banned, *44 Liquormart*, 517 U.S. at 499 (plurality), and the restrictions relate directly to the State's concern that even truthful advertising can mislead immature minors. Cf. *Sandoz Pharms. Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 229-30 (3d Cir. 1990) (whether an advertisement is misleading under Lanham Act depends on the sophistication of the audience). Thus, the regulations here directly further the State's regulation of tobacco transactions and are designed to ensure that minors *can* participate in a "fair bargaining process" (cf. *44 Liquormart*, 517 U.S. at 501 (plurality); Pet. Br. 35) concerning the purchase or use of this product.

Banning unavoidable tobacco advertising in those areas most frequented by children is an exercise of the police power at its zenith. It is supported by the States' compelling interest in "protecting the physical and psychological well-being of minors," *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989), and by the States' substantial interests in protecting both captive audiences, see, *e.g.*, *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949), and "vulnerable" consumers, *Ohralik*, 436 U.S. at 465. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748-51 (1978), this Court found that the confluence of these interests justified a prohibition on a type of speech entitled to even greater protection than advertising, and that was broadcast over a medium less invasive than billboards. See *Packer Corp.* v. *Utah*, 285 U.S. 105, 110 (1932) ("young people as well as . . . adults have the message of the billboard thrust upon them . . . . The radio can be turned off, but not so the billboard").[33]

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[33] *Carey* is not to the contrary. *See* Pet. Br. at 36-37. That case involved a complete ban on advertising of a product that the State could not prohibit minors from purchasing. 431 U.S. 694, 700-01. The State sought to justify its total ban on the ground that the advertising offended

Strict scrutiny review is thus plainly unjustified, and would impermissibly invite judicial assessment of policy judgments that courts are singularly ill-suited to second-guess. Indeed, petitioners' arguments illustrate this danger. They contend that Massachusetts' regulation is invalid because it does not restrict advertising of alcohol, a product that also cannot be sold to minors. Pet. Br. 38. But other governments (including Los Angeles) have addressed alcohol advertising, and in any case the questions of whether, when, and how to combat the problems of underage smoking as distinct from underage drinking are subjects for legislative, not judicial, determination. This Court should reject petitioners' invitation to second-guess these legislative judgments.

B. The Regulations Satisfy *Central Hudson*.

Petitioners alternatively argue that the regulations are unconstitutional even under the lesser degree of scrutiny applied in *Central Hudson*. This argument, too, is untenable.

1. The Regulations Directly Advance The State's Interests.

Petitioners claim the regulations do not directly advance the State's interests because the State lacked any "longitudinal stud[ies]," Pet. Br. at 42, or other exacting evidentiary proof (1) of a causal link between advertising and underage smoking, or (2) that the regulations will significantly reduce such smoking beyond any reduction attributable to the advertising restrictions in the MSA. These arguments profoundly overstate the State's burden of proof.

First, States may justify restrictions on commercial speech with "studies and anecdotes pertaining to other locales," or even "solely on history, consensus, and 'simple common sense.'" *Went for It, Inc.*, 515 U.S. at 628. It is

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moral sensibilities. *Id.* at 701. Here, there is only a partial restriction that is not designed to protect moral sensibilities but rather to suppress demand for sales that the State can and has barred.

commonsense that "[t]here is an immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569.[34] Certainly, petitioners "would not contest the advertising [restrictions] unless [they] believed that promotion would increase [their] sales." *Id.*

Second, the State relied on far more than commonsense. Although petitioners denigrate the *1994 Surgeon General Report* for failing to prove that advertising causes underage smoking, the report found that pervasive advertising "leads youths to overestimate the prevalence of smoking and to consider smoking as normative," and that those who overestimate its prevalence are more likely to smoke. *Id.* at 192-94. The City of Los Angeles relied on numerous other studies that confirm these conclusions. See *supra* at 3-4.[35] Such evidence, together with commonsense, is more than adequate to support the State's regulations. Contrary to the claims of petitioners' supporting *amici*, the unsurprising fact that there are conflicting studies on the complex social phenomenon of underage smoking does not prevent States from acting unless and until they prove to a judge or jury that advertising causes this harmful behavior. See Br. of Newspaper Ass'n of America et al., at 19-23. Where there is conflicting evidence, courts are not to "'reweigh the evidence *de novo*'" and determine whether, "as an objective matter," a legislative body's judgment is "correct." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 211 (1997). Rather, as long as a

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[34] *See also Anheuser Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996); *Dunigan* v. *City of Oxford*, 718 F.2d 738, 749 (5th Cir. 1983); *Williams* v. *Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980); *see also Greater New Orleans Broad. Ass'n*, 527 U.S. at 189 ("it is no doubt fair to assume that more advertising *would* have some impact on overall demand" (emphasis added)).

[35] Petitioners' "brand loyalty" argument, Pet. Br. at 42 n.8, is thus irrelevant. Advertising that induces minors to *begin* smoking is not harmless because its affect on those already addicted may merely be to shift brand loyalties.

legislative conclusion is "reasonable and supported by substantial evidence" it must be upheld, "regardless of whether the evidence is in conflict." *Id.*; see also *Dunigan*, 718 F.2d at 748 n.8 ("whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question").

Petitioners' claim that the State must demonstrate a significant marginal reduction in underage tobacco use beyond that attributable to the MSA is similarly flawed. A State law's constitutionality cannot depend on the fortuity of whether it was enacted prior to a settlement (as was Los Angeles's ordinance), or whether the evidence is tailored to the precise contours of such a settlement. Relying on commonsense assessments, the Court has required actual evidence that a restriction materially advances a State's interest only where the benefit is not intuitively obvious. Compare *Went for It, Inc.*, 515 U.S. at 626-29 (requiring no proof that a solicitations ban would result in a measurable improvement in lawyers' image), with *44 Liquormart*, 517 U.S. at 505-07 (plurality) (requiring evidence that inflated prices would reduce alcohol consumption), and *Bolger* v. *Younger Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) ("reasonably assuming" that ban on mailing contraceptive advertising would marginally aid parents in shielding their children because parents already control access to mail in the home and can stop the delivery of offensive items).[36] Here, the benefits are obvious. The MSA is incomplete. It neither binds every tobacco company nor provides protection against all advertising that entices minors to purchase cigarettes; and States and Localities need the flexibility to supplement it to address local needs and conditions. Eliminating tobacco ads up to 14 square feet in size from indoor and outdoor areas

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[36] *Edenfield* is not to the contrary. There, the Court required evidence that the counter-intuitive harm the State sought to prevent—that in-person solicitations by accountants would mislead sophisticated business executives—actually existed. *See* 507 U.S. at 771-73.

frequented by children likely will materially reduce underage smoking. The Constitution requires nothing more.

2. The Regulations Are Proportional To The State's Legitimate Interests.

Finally, the regulations satisfy *Central Hudson*'s requirement of a "reasonable" fit "between the legislature's ends and the means chosen to accomplish those ends"; they are "narrowly tailored" and proportional to the interest served. *Went for It, Inc.*, 515 U.S. at 632 (quotation marks omitted). Petitioners' claim that the restrictions constitute "blanket bans" that leave no "alternative channels . . . readily available," Pet. Br. 45-46 (internal quotation marks omitted), is demonstrably untrue. See *supra* at 8. Because there are "many other ways for [adults] to learn about the availability of" petitioners' products, *Went for It, Inc.*, 515 U.S. at 633, adults will not be reduced "'to reading only what is fit for children,'" Pet. Br. at 47 (quoting *Bolger*, 463 U.S. at 74).[37] The availability of other means of advertising distinguishes this case from the total bans in petitioners' cited cases.[38]

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[37] *Amici* National Advertisers are thus wrong in arguing that other modes of communication "cannot save" the regulations. ANA Br. at 18 n.9. The case they cite, *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85 (1977), states only that alternative modes are inadequate if they provide no realistic opportunity for communicating. *Id.* at 93. Nor has this Court ever invalidated a ban that left open other means of communication because one of many affected vendors may have greater difficulty advertising one of the many products it offers for sale. *See* Br. of The National Association of Convenience Stores at 5-11.

[38] *See Virginia State Bd of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-50 (1976) (law prohibited "'advertis[ing] or promot[ing], directly or indirectly, in any manner whatsoever'" prescription drug prices); *Central Hudson*, 447 U.S. at 570 (ban "reaches all promotional advertising"); *44 Liquormart*, 517 U.S. at 489 (law banned "'advertising in any manner whatsoever' the price of any alcoholic beverage"); *Carey*, 431 U.S. at 681 (law made it a crime "for any person . . . to advertise or display contraceptives"); *Bolger*, 463 U.S. at 61 (law banned mailing of "'[a]ny unsolicited advertisement'" concerning

Accordingly, petitioners err in contending that States should have adopted a host of alternative measures instead of the challenged regulations. States have already used "direct regulation" and "educational campaigns," *44 Liquormart*, 517 U.S. at 507 (plurality), and the federal government has required "warnings[] and disclaimers." *Id.* at 498. Having found these measures insufficient, States need not exhaust all other avenues before restricting invasive forms of advertising in areas frequented by children. Indeed, while petitioners and their *amici* dismiss the scientific evidence that supports these regulations, they cite no evidence to prove the efficacy of the expensive licensing and enforcement measures they advocate.

Petitioners' contention that the State should have employed a 500-foot, instead of a 1000-foot, zone is similarly misguided. After detailed study, Los Angeles found that most tobacco advertising is concentrated in such areas, and that a 500-foot restriction would be ineffective. See *supra* at 6. In light of such findings and the numerous alternative channels the regulations leave open, the additional protection afforded minors by a 1000-foot zone is constitutionally permissible. Nor does the fact that children *in* parks, playgrounds, and schoolyards cannot see *some* prohibited signs that are 1000 feet away, Pet. Br. at 47, provide a basis for second-guessing the State's choice. Just as it was reasonable for the State to conclude that children are most frequently in parks and schools, it was reasonable to conclude that they typically travel the streets and frequent stores within 1000 feet of these venues, and thus will see invasive advertising *on their way to* parks and schools.

Finally, the numerous alternative channels open to petitioners, as well as the invasiveness of their outdoor advertising, distinguish the State's restrictions from those at

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contraceptives (alteration in original)); *Sable*, 492 U.S. at 118 (law "impose[d] an outright ban on indecent as well as obscene" interstate telephone calls); *Butler* v. *Michigan*, 352 U.S. 380, 381 (1957) (blanket prohibition of "'obscene, immoral, lewd, or lascivious'" materials).

issue in the indecency cases petitioners cite. In striking down blanket bans on dial-a-porn, unsolicited mailings for contraceptives, and criminal prohibitions on internet transmissions of obscene or indecent messages to minors, the Court emphasized that the communications were not as invasive as radio or television broadcasts, that parents had ample means of shielding their children from offensive material, and that a desire to protect the most "determined child" could not justify a total prohibition.[39] Petitioners' advertising, in stark contrast, is *more* invasive and unavoidable than radio and television broadcasts; it is uniquely and repeatedly accessible to *all* children, not merely the most determined; and parents have *no* ability to shield their children from these messages as their children travel to and from parks and schools.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

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[39] *See Sable* 492 U.S. at 127-30 (unlike "public displays . . . which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication," and use of access codes could keep such messages from children); *Reno* v. *ACLU*, 521 U.S. 844, 869 (1997) ("the Internet is not as 'invasive' as radio or television," sexually explicit materials do not "appear on one's . . . screen unbidden," and are preceded by warnings); *Bolger*, 463 U.S. at 74 (while broadcasting "is 'uniquely accessible to children, even those too young to read[,]' [t]he receipt of mail is far less intrusive and uncontrollable" (emphasis omitted)).

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APPENDIX A

CALIFORNIA CITIES, COUNTIES, AND ORGANIZATIONS JOINING WITH THE CITY OF LOS ANGELES AS *AMICI CURIAE* LORILLARD V. REILLY

The following thirty California local governments, and one non-profit organization, join with the City of Los Angeles in filing this *Amicus* brief in support of the Commonwealth of Massachusetts. They have either passed ordinances similar to that enacted by the Commonwealth of Massachusetts and the City of Los Angeles, or wish to preserve the police power of local governments to take such action in the future.

Berkeley Population[1]: 102,724	Ordinance No. 6472-N.S. (adopted Jan. 26, 1999) prohibits tobacco advertisements in a publicly visible location within 1,400 feet of a school. The ordinance exempts advertisements inside a commercial establishment other than window advertising that is visible to the public from any street, sidewalk or other public thoroughfare.
Capitola Population: 10,171	Capitola does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.

[1] Population data based on U.S. Census Bureau Data, 1990 Census

Carlsbad Population: 63,126	Carlsbad does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Chula Vista Population: 135,163	Chula Vista does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Hawthorne Population: 71, 349	Ordinance No. 1655 (adopted Aug. 24, 1998) prohibits outdoor tobacco advertising signs within a residential zone, or within 1,000 feet of a school, park, playground, recreational facility, youth or childcare center, entertainment park, or church. The ordinance exempts signs located adjacent to a freeway.
Hayward Population: 111,498	Hayward does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Hollister Population: 19,212	Hollister does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Inglewood Population: 109,602	Ordinance No. 97-20 (Sept. 23, 1997) prohibits tobacco advertising on billboards within 1,500

	feet of, or oriented so that the message is visible from, any school, child care facility, nursery school, hospital, place of worship, park, or recreational facility.
Lakewood Population: 73,557	Lakewood does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Los Gatos Population: 27,357	Los Gatos does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Martinez Population: 31,808	Martinez does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Monterey Population: 31,954	Monterey does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Mountain View Population: 67,460	Mountain View does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Oceanside Population: 128,398	Ordinance No. 099-13 (adopted June 16, 1999) prohibits tobacco advertising displays inside stores if the signs are below 4 feet from the

	floor; within two feet of candy, snack, or non-alcoholic beverage displays; or posted on the inside or outside of the windows or doors of the business if the advertising is visible to the public from outside the establishment. Oceanside also prohibits tobacco product displays within two feet of candy, snack, or non-alcoholic beverage displays. These regulations apply to stores located within 1,000 feet of a school, recreation center or facility, child care center, arcade, or public library.
Palm Desert Population: 23,252	Palm Desert does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Palo Alto Population: 55,900	Palo Alto does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Pleasant Hill Population: 31,585	Ordinance No. 737 (adopted July 19, 1999) prohibits tobacco advertisements in a publicly visible location within 1,600 feet of an elementary, middle, or secondary school, a public playground, or a playground area in a public park. Pleasant Hill exempts advertisements inside a commercial establishment unless the advertising is attached to or in contact with a

	window or door so that it is visible to the public from any street, sidewalk or other public thoroughfare.
Pleasanton Population: 50,553	Pleasanton does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Sacramento Population: 369,365	Sacramento does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
San Diego Population: 1,110,549	Ordinance No. 18597 (adopted Oct. 20, 1998) prohibits publicly visible tobacco advertisements or promotions, except those within industrial or commercial zones and more than 1,000 feet from a school, playground, recreation center or facility, child care center, arcade, or library. San Diego also prohibits tobacco advertising displays that are below 4 feet from the floor and tobacco advertisements or product displays that are within 2 feet of candy, snack, or non-alcoholic beverage displays inside stores that are located within a 1,000 foot radius of a school, playground, recreation center or facility, child care center, arcade, or library.

San Francisco (City and County) City Population: 723,959 County Population[2]: 746,777	Ordinance No. 1-98 (adopted Jan. 5, 1998) prohibits tobacco advertisements that are visible from any street, sidewalk, or other public thoroughfare, except on billboards within 660 feet from the highway. San Francisco exempts indoor advertising except if attached to or in contact with a window or door so as to be visible from the street.
San Luis Obispo Population: 41,958	San Luis Obispo does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
San Marcos Population: 38,974	Ordinance No. 99-1066 (adopted July 13, 1999) prohibits tobacco advertising displays inside stores that sell tobacco products if the signs are below 4 feet from the floor; within two feet of candy, snack, or non-alcoholic beverage displays; or posted on the inside or outside of the windows or doors of the business if the advertising is visible to the public from outside the establishment. San Marcos also prohibits tobacco product displays within two feet of candy, snack, or non-alcoholic beverage displays.

[2] County population data based on U.S. Census Bureau, County Population Estimates Program, July 1, 1999

Santa Clara Population: 110,642	Santa Clara does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Santa Cruz Population: 49,040	Ordinance No. 99-05 (adopted Apr. 27, 1999) prohibits tobacco advertising in a publicly visible location except advertising in a non-residential zone provided the ads are more than 1,000 feet from a public or private kindergarden, elementary, middle, junior, or high school; licensed child-care facility or preschool; public park; ocean park; public library; or any designated bus stop. Santa Cruz exempts advertisements inside a commercial establishment unless the advertising is in or adjacent to a window or door so that it is visible to the public from any street, sidewalk or other public thoroughfare.
Saratoga Population: 28,061	Saratoga does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Tiburon Population: 7,532	Tiburon does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.

Town of Danville Population: 31,306	Ordinance No. 99-06 (adopted June 1, 1999) prohibits tobacco adver-tising in a publicly visible location within 1,600 feet of an elementary or secondary school, public park, or playground. Danville exempts advertisements inside a commercial establishment unless the advertising is attached to or in contact with a window or door so that it is visible from a street, sidewalk or other public thoroughfare.
Victorville Population: 40,674	Victorville does not currently have an ordinance regulating tobacco advertising, but wishes to preserve its right to enact such regulation in the future.
Los Angeles County Tobacco Control Alliance	The Los Angeles County Tobacco Control Alliance represents over 350 agencies and coalitions work-ing together to increase under-standing of the prevalence of smoking among youth and adults, and has participated in proce-edings involving tobacco regula-tory ordinances in many California municipalities.

APPENDIX B

CITY OF LOS ANGELES ORDINANCE NO. 172212

The following is Ordinance No. 172212, entitled Restrictions on Signs Advertising Tobacco Products, which was adopted by the City of Los Angeles on September 9, 1998. A substantially similar ordinance addressing advertisement of alcoholic beverages, not reproduced here, was adopted on the same date by the City of Los Angeles as Ordinance No. 172213.

RESTRICTIONS ON SIGNS ADVERTISING TOBACCO PRODUCTS

SEC. 45.20. PURPOSE. Regulating tobacco product advertising on certain signs is a reasonable and necessary means to protect and promote the general welfare of the children and minors of the City of Los Angeles exposed to certain signs advertising tobacco products.

The Supreme Court has repeatedly recognized that children and minors deserve special solicitude because they lack the ability to assess and fully analyze the information presented through commercial advertising.

Signs which can be seen from the outdoors are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation.

The regulations promote the general welfare and temperance of children and minors and are intended to help reduce the illegal consumption and purchase of tobacco products by children and minors by limiting their exposure to the advertising of tobacco products on certain on-site and off-site signs.

SEC. 45.21. DEFINITIONS. The following words and phrases, whenever used in this article, shall be construed as defined in this section. Words and phrases not defined herein shall be construed as defined in Sections 11.01, 12.03 and 91.6203 of this Code.

A. Entertainment Park – a commercial enterprise that offers rides, games and other entertainment.

B. Public Parks and Playgrounds – an area of land, beach or pier set aside for public recreational and/or ornamental purposes, which is under the control, operation or management of a governmental agency, and wherein there may be an area containing, but not limited to, equipment such as swings and seesaws, athletic fields, baseball diamonds, basketball courts, tennis courts, or swimming pools.

C. Publicly Visible Location – any outdoor location visible to the general public including, but not limited to, off-site signs, pole signs, wall signs, projecting signs, monument signs, illuminated architectural canopy signs, marquee signs, mural signs, freestanding signboards, and roof signs, and, including, any location that is inside a building wherein the sign is attached to, affixed to, leaning against, or otherwise placed within three feet of any window or door in such a manner that it is visible from outside the building. The term "publicly visible location" shall not include any location that is visible only by those inside the building premises.

D. Religious Institution – any building or structure that is maintained and used exclusively for religious worship, including customary incidental, educational and social activities in conjunction therewith.

E. Residential Use – any lot that is identified in the adopted Community Plan as having Commercial Land Use designation that permits residential uses.

F. Residential Zone – any RA, RE, RS, R1, RU, RW1, R2, RD, RMP, RW2, R3, R4, or R5 zoned lot as set forth in Section 12.04 of this code.

G. Schools – an institution of learning for minors, whether public or private, which offers instruction in those courses of study required by the California Education Code or which is maintained pursuant to standards set by the State Board of Education. This definition includes kindergarten, elementary, junior high, senior high or any special institution of learning under the jurisdiction of the State Department of Education, but it does not include a vocational or professional institution or an institution of higher education, including a community or junior college, college or university.

H. Tobacco Products – any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipes, tobacco snuff, chewing tobacco and dipping tobacco; cigarette papers; or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco or products prepared from tobacco.

I. Youth Center – any designated indoor, public, private or parochial facility, other than a private residence or a multiple dwelling unit, which contains programs which provide, on a regular basis, activities or services for persons who have not yet reached the age of 18 years, including, but not limited to, community-based programs, after-school programs, weekend programs, violence prevention programs, leadership development programs, vocational programs, substance abuse prevention programs, individual or group counseling, remedial, tutorial or other educational assistance or enrichment, music, art, dance and other recreational or cultural activities, physical fitness activities and sports programs.

SEC. 45.22. PROHIBITIONS.

A. No person shall place, permit, or maintain on any on-site or off-site sign, a poster, placard, device, graphic display, or any other form of advertising that advertises tobacco

products in publicly visible locations within 1,000 feet of any residential zone, residential use, school, religious institution, entertainment park, youth center, or public park or playground except as permitted under Section 45.23.

B. The distance specified in this section shall be the horizontal distance measured in a straight line from the property line of a residentially zoned property, residential use, school, religious institution, entertainment park, youth center, or the perimeter of a public park or playground to the closest visible edge of the advertising sign face without regard to intervening structures.

SEC. 45.23 EXCEPTIONS. The prohibitions set forth in this article shall not apply to the following signs advertising tobacco products. This section shall not be construed to permit any sign that is otherwise restricted or prohibited by law.

A. The placement of signs advertising tobacco products:

(1) Inside the premises of a building that lawfully sells tobacco products, unless such sign is attached to, affixed to, leaning against, or otherwise placed within three feet of any window or door in such a manner that it is visible from outside the building; or

(2) On commercial vehicles used exclusively for transporting tobacco products.

B. Any on-site sign that contains the name or slogan of a business that lawfully sells tobacco products that has been placed at or upon the business premises for the purpose of identifying the business.

C. Any on-site sign that contains only generic word descriptions of cigarettes, cigars, tobacco, smoke, or any other generic description of tobacco products.

D. Any neon or electrically charged sign, if otherwise allowed by the Los Angeles Municipal Code, within the

premises of a building that lawfully sells tobacco products that is provided as part of a promotion of a particular brand of tobacco products, unless such sign is attached to, affixed to, leaning against, or otherwise placed within three feet of any window or door in such a manner that it is visible from outside the building.

E. Any sign located inside a stadium, arena, or amphitheater, provided the sign cannot be seen from outside the stadium, arena, or amphitheater.

F. Any sign or other form of advertising on a Metropolitan Transit Authority vehicle, or any other government operated, contracted or licensed mode or method of transportation. This exception shall not apply to any mode or method of transportation operated, contracted or licensed by the City of Los Angeles.

G. The display of public service messages or similar announcement opposing the use of tobacco products or that are designed to encourage minors to refrain from using or purchasing tobacco products. However, this subsection shall not be construed to permit an advertisement which purports to oppose the use of tobacco products when that message is conveyed in conjunction with the display of a recognized tobacco company logo, trademark or name used for marketing or promotion of tobacco products.

H. Any sign advertising of tobacco products that is otherwise consistent with the signage provisions contained in Article IV and Exhibit I of the Reciprocal Easement and Environmental Restriction Agreement by and among the City of Los Angeles, the Community Redevelopment Agency of the City of Los Angeles, and L.A. Arena Land Company, Inc., recorded in the official records of the County of Los Angeles as instrument No. 95801502.

I. The display of any non-commercial message.

SEC. 45.24. ENFORCEMENT. Violations. It shall be unlawful for any person to violate any provision of this article. Any person or who violates any of the provisions of this article or causes or permits another person to violate any of the provisions of this article is guilty of a misdemeanor. Each violation of the provisions of this article shall constitute a separate offense.

SEC. 45.24. OPERATIVE DATE. The provisions of this article shall become operative 365 days from its effective date.

Supreme Court, U.S.
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MAR 26 2001
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No. 00-596

In the
Supreme Court of the United States

LORILLARD TOBACCO CO., et al.,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, AND MASSACHUSETTS MEDICAL SOCIETY, IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The organizations submitting this brief share a commitment to promoting the health and well-being of the people of the United States. They therefore share a common interest in supporting the Massachusetts Attorney General's efforts to protect the public, and especially children, from solicitations to use tobacco products. A brief description of each individual Amici is provided in the Appendix to this brief.

SUMMARY OF ARGUMENT

The analysis of the various issues offered in this amicus brief rests upon a common foundation: The restriction of intrusive forms of tobacco advertising serves values so profoundly important that this Court should accord them great respect when considering the reach of the First Amendment and federal preemption. When young children are constantly and involuntarily bombarded with seductive messages appearing on neighborhood storefronts that promote a lifelong addiction, not only is their health endangered, but their right to be free from having adult choices foisted upon them is not so subtly infringed. When parental admonitions against smoking are trivialized by in-store cigarette displays at eye level next to the candy, the right of parents to guide their children toward a life of health and vitality is undermined. And when cigarettes at

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[1] *Rule 37 Compliance:* This brief is being filed with the Court by the written consent of all parties, in compliance with Rule 37. No counsel for any party authored this brief in whole or in part. A monetary contribution to the preparation and submission of this brief was made through a grant to Prof. Donald Garner from the Substance Abuse Policy Research Program of the Robert Wood Johnson Foundation, Route 1 and College Road East, P.O. Box 2316, Princeton, N.J. 08543-2316.

local convenience stores are strategically placed within reach of elementary school kids, state laws prohibiting tobacco distribution to children are publicly mocked.[2]

The Petitioners in this case seek to gain an absolute right to impose tobacco advertising upon young children by way of large storefront billboards, ubiquitous in-store displays and handy cigarette packages in the aisles of convenience stores. The Attorney General of Massachusetts has determined that these are unfair and/or deceptive methods of advertising, in that they encourage tobacco use by children under legal age. Petitioners claim that this determination is meaningless. This case will finally answer whether our Constitution and federal law strip states and local communities of all their authority to protect their children from being lured into a lethal addiction by unavoidable tobacco advertising.

ARGUMENT

I. THE MASSACHUSETTS REGULATIONS CONTROL ONLY THE LOCATION OF TOBACCO ADVERTISING, NOT THE ADVERTISING CONTENT, AND ARE THEREFORE NOT PREEMPTED BY FEDERAL LAW.

The central question raised by Petitioners' preemption challenge is whether Congress in 1969 intended to grant the cigarette companies the unqualified right to involuntarily inflict their advertising upon children by all means, fair or foul.

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[2] *See generally* Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and his Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479 (1997).

Petitioners maintain that the billboard and in-store regulations promulgated by the Attorney General of the Commonwealth of Massachusetts, 940 C.M.R. §§ 21.00-27.07 ("Regulations") are preempted by § 5(b) of the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), Pub. L. No. 91-222, 84 Stat. 87 (1970), which provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (amending the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) ("1965 Act")).

Petitioners contend that there is no good reason to consider what Congress might have really wanted to accomplish by § 5(b) because the dictionary definition of the words used are broad enough to encompass any health-based state or local regulation of any cigarette advertising or promotional practice. (Pet'rs' Br. at 15-16.) If the Petitioners' view prevails, the cigarette industry will be free – in the words of the only Supreme Court opinion to rule on cigarette billboards – to "thrust" their advertising message upon young people "by all the arts and devices that skill can produce." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

While Petitioners frequently refer to their acceptance of the advertising restraints contained in the "Master Settlement Agreement" (MSA), (Pet'rs' Br. at 3, 9, 12-13, 43, 45-46), that fact should be accorded no weight in this Court's analysis of either the preemption or First Amendment questions at stake. The states cannot rely on the MSA as a substitute for direct regulation. The MSA neither controls all the business entities that advertise tobacco products, nor does it sufficiently restrict the methods of advertising that pose the greatest threat to children.

The MSA imposes no limits at all on retailers, boutique cigarette manufacturers, distributors who re-import cheap domestic cigarettes, and other "gray market" tobacco companies. *See CA Judge Refuses to Enjoin Implementation of MSA,* Andrews' Tobacco Industry Litig. Rep., Nov. 12, 1999, at 13. If the 1969 Act preempts all health-based state and local regulation of cigarette promotion, these companies and any future start-up manufacturers of tobacco will be free to increase their share of the critical juvenile market by the same means pioneered by the Petitioners. They could, for instance, begin openly passing out free samples of cigarettes to young teenagers at rock concerts and handing out cigarette posters using cool cartoon characters to first-graders. *Cf. Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F. 3d 100, 105 (2d Cir. 1999)(describing absurd results of interpreting § 5(b) in hyper-literal fashion).

Petitioners, meanwhile, would remain free to erect store-front signs across from elementary schools and wallpaper the interior of convenience stores near playgrounds with point-of-purchase displays – while pushing the boundaries of the MSA. In the case at bar, Petitioners initially sought to strike down, on preemption grounds, a provision in the Regulations that barred the free distribution of samples, except mail sampling with age verification. (Pet. Cert. at 5 n.4); *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124, 128 (D. Mass. 1999). Equally disquieting, one of the Petitioners has been sued by various states for allegedly targeting teenagers, in violation of the MSA. Gordon Fairclough, *California Sues Reynolds Over Magazine Ads*, Wall St. J. March 20, 2001, at A3.

Amici submit that Congress never intended to completely destroy the power of states and municipalities to protect children from an addiction that promises to kill more of them than cocaine, heroin, fire, suicide, homicide, AIDS and

auto accidents combined. *See* Committee on Preventing Nicotine Addiction in Children and Youths, Institute of Medicine, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths* 3 (Barbara S. Lynch & Richard J. Bonnie eds., 1994). On the contrary, when Congress passed the 1969 Act, it intended to preempt only those health-based state or municipal "requirement[s] or prohibition[s]" that affect the *content* of tobacco advertising. It never intended to preempt zoning or zoning-like laws that merely restrict the *locations* in which tobacco advertising is permitted to appear. The text of the statute as a whole, its legislative history, case law and common sense strongly point to that conclusion.

A. Federalist principles demand an inquiry into legislative history and the use of other aids to construction in order to understand and limit the scope of an express preemption provision.

When the exercise of historic state police powers is challenged on preemption grounds, a reviewing court must look, "not only in the text," but must form a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Thus, this Court is duty-bound to scrutinize the legislative history and use other extrinsic aids to avoid suppressing local self-rule beyond what Congress intended. This principle is embedded in the approach taken in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) – the only Supreme Court decision that has yet interpreted § 5(b).

Though the Court was divided on the ultimate question in *Cipollone*, every opinion in the case ventured beyond the literal text of § 5(b) in interpreting that section and used

extrinsic aids, including legislative history, to attempt to ascertain Congress's true intentions. *Cipollone*, 505 U.S. at 513-515, 519-521, 529-30 (plurality opinion); *id.* at 534-35, 539-542 (Blackmun, J., concurring in part and dissenting in part); *id.* at 553 (Scalia, J., concurring in part and dissenting in part).

The Court's intensive inquiry into Congressional intent was prompted by its guardianship of our federalism – in particular, the fundamental principle that the states' traditional police powers are not to be superseded unless Congress has clearly manifested its intention to do so. *Id.* at 516, 523 (plurality opinion); *id.* at 533 (Blackmun, J., concurring in part and dissenting in part). Accordingly, a majority of the Court agreed that § 5(b) must be given a narrow construction. *Id.* at 523 (plurality opinion); *id.* at 533-34 (Blackmun, J., concurring in part and dissenting in part).

This Court's post-*Cipollone* decisions have erased any lingering doubts that it is obligated to consider legislative history and other indicia of Congressional intent when a broadly worded express preemption provision is at issue. *See, e.g., Medtronic,* 518 U.S. at 484-86; *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 331-32 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

The disputed and ambiguous phrases in § 5(b) – "requirement or prohibition," "based on smoking and health" and "with respect to the advertising or promotion of any cigarettes" – are potentially sweeping. *Cf. Blue Cross*, 541 U.S. at 655 (noting that, taken literally, the term "relate to" in ERISA's preemption provision could broadly preempt state laws). The dictionary-driven "plain meaning" approach that

Petitioners urge this Court to adopt creates an unacceptable risk that more state and local sovereignty will be destroyed than Congress intended. This Court should be guided instead by its well-settled rule that "[t]he purpose of Congress "must be 'the ultimate touchstone' of pre-emption analysis." *Cipollone*, 505 U.S. at 516.

Most importantly, Congress is presumed not to have intended to destroy the right of state and local governments to regulate in areas the "states have traditionally occupied." *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 330 (1947). State exercises of their historic powers "are not to be superseded unless that is the clear and manifest purpose of Congress." *Id.* In applying that rule, the *Cipollone* Court found that, "in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Cipollone*, 505 U.S. at 516. So too, in this case, the legislative history offers no sign that Congress wished to insulate cigarette manufacturers from longstanding state or local zoning laws.

B. The legislative history of the 1965 and 1969 Acts, and a fair reading of the statute as a whole, support the conclusion that § 5(b)'s purpose was to protect the tobacco industry from having to alter the *content* of its brand advertising.

In 1964, Surgeon General Luther Terry issued his landmark Report tying cigarette smoking to lung cancer. U.S. Dep't of Health, Educ. & Welfare, U.S. Surgeon Gen.'s Advisory Comm., *Smoking and Health* (1964). Strong public reaction prompted the Federal Trade Commission and several states to consider requiring warnings on cigarette packages and in advertising. *Cipollone*, 505 U.S. at 513.

Congress stepped into this public health maelstrom by adopting the 1965 Act, which required cigarette packages to carry a warning that cigarette smoking was hazardous to health. In § 5(a) of the 1965 Act, Congress prohibited other government bodies from requiring the placement of any other statement on cigarette packs. Similarly, in § 5(b), Congress provided that: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this act."

These preemption provisions were set to expire on July 1, 1969. 1965 Act, § 10. As that date approached, the states again began entertaining proposals to toughen restrictions on cigarette advertising, *Cipollone*, 505 U.S. at 514-515, and the tobacco companies again faced the prospect that each of the fifty states (as well as cities and counties) might impose packaging and advertising requirements on the industry.

It was in that context that Congress adopted the 1969 Act, which banned cigarette ads from TV and radio, allowed the FTC to impose warning-label requirements on print advertisements after July 1, 1971, and stiffened the health warning requirements for cigarette packaging. It also amended § 5(b), introducing the present language: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b).

Obviously, the current version of § 5(b) is broader than the original. However, read in the light of this history, the salient change substituting "requirement or prohibition" for "statement" did not indicate that Congress intended to preempt anything other than state or local measures that affected

advertising content.[3] Rather, it indicates that Congress intended to preempt not only the affirmative act of requiring "statements" but also any health-based prohibitions of particular messages, themes or images.

Congress's express statement of purpose in the 1965 and 1969 Acts also supports the conclusion that Congress was not concerned with state or local rules that regulate only the location of cigarette advertising. When Congress amended § 5(b), it let stand the same declaration of legislative intent found in the 1965 Act. 15 U.S.C. § 1331. It still sought to keep the public "adequately informed about any adverse health effects of cigarette smoking" and to protect "commerce and the national economy" from being "*impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health*." *Id.* (emphasis added).

In 1969, no less than in 1965, Congress's sole concern, with respect to preemption, was to prevent state and local content regulation and thereby protect the tobacco and advertising industries from the burden of having to produce different ads to conform to each state or local regulation.

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[3] Congress may certainly have intended § 5(b) to prevent states from enacting bans on cigarette advertising in all or most media, as the California State Senate had started to do in a bill passed in 1969. *Cipollone*, 505 U.S. at 515 n. 11. Such extreme measures obviously affect advertising content by eradicating it altogether. However, the Regulations at issue here are narrowly focused. They do not touch magazine and newspaper ads, clothing promotions, direct mail or Internet advertising, and they permit both outdoor and retail establishment advertising in zones that are less frequented by children.

This point was clearly made in a 1969 House debate. Rep. Brock Adams (D-Wash.) introduced an amendment to allow states that prohibited cigarette sales to minors to require all cigarette advertising to include a warning that such sales were illegal. Rep. Lawrence Fountain (D-N.C.) spoke against the amendment, noting that it "would create utter chaos and virtually make impossible . . . the dissemination of nationally published magazines and indeed many locally published newspapers," and that it would force advertisers to create "fifty different advertising formats." 115 Cong. Rec. 16291 (1969). The Adams amendment failed. *Id. See also* H.R. Rep. No. 91-289, at 33 (1969) (minority views of Reps. Jarman, Dingell and Adams). Congress was motivated to modify § 5(b) by the fear of homegrown message regulation, not the fear that tobacco companies would have to follow state or local zoning laws.

After the House bill passed and was sent to the Senate, it was referred to the Senate Commerce Committee, whose members included Senator Frank Moss, a forceful and ardent foe of tobacco. Senator Moss was from Utah, a state which had enacted a ban on *all* in-store tobacco displays and *all* outdoor tobacco advertising forty years earlier. Laws Utah 1929 ch. 92. Utah's protection of the right of its citizens to be free from having tobacco messages imposed upon them was not some quaint old law that was unknown or unenforced. In fact, it had been upheld by this Court in *Packer Corp. v. Utah*, 285 U.S. 105 (1932) and it was in force in 1969. It remains in force today. Utah Code Ann. § 76-10-102(1) (1995).

If it were manifestly obvious that the bill that became the 1969 Act would preempt Utah's ban, then why didn't Senator Moss speak against it? Why instead did he become the Senate Manager of the bill? H.R. Rep. No. 91-897, at 8 (1970). The reason neither he nor any other member of Congress ever voiced any concern about state or local tobacco billboard

regulation is that the 1969 Act was never meant to strip states like Utah of their sovereign authority to safeguard citizens from having tobacco advertising thrust upon them by intrusive methods. Where a broadly worded preemption statute is at issue, Congress's silence with respect to a well-established state regulatory measure, such as Utah's law, is a reliable indication that Congress did not intend to preempt that measure. *See Medtronic*, 518 U.S. at 491 (plurality opinion); *Dillingham*, 519 U.S. at 331-32. If § 5(b) did not preempt Utah's broad state-wide prohibition against all outdoor and in-store cigarette advertising, it surely does not preempt the Massachusetts Attorney General's much narrower Regulations.

The Senate's report on the bill reiterated that preemption was needed to "avoid the chaos created by a multiplicity of conflicting [state and local] regulations." S. Rep. No. 91-566, (1969), *reprinted in* 1970 U.S.C.C.A.N. at 2652, 2663. Section 5(b) was described as "narrowly phrased" and not intended to touch state power over sales to minors, taxation, indoor smoking, or "similar police [power] regulations. It is limited entirely to State or local requirements or prohibition [sic] *in* the advertising of cigarettes." *Id.* (Emphasis added).

These statements strongly indicate that Congress intended § 5(b) only to prevent state or local interference with the content of cigarette advertisements because only content regulation would create a multiplicity of conflicting rules "in the advertising of cigarettes." Only content regulation by the states threatens to impose on the tobacco companies and their advertisers the substantial burden that prompted Congress to defeat the Adams amendment – the burden of having to produce ads to "conform to fifty different formats."

Unlike content regulations, location restrictions do not create the advertiser's nightmare that Congress sought to

prevent when it adopted § 5(b). They do not require the tobacco companies to design and produce different advertisements to accommodate diverse state or local laws, and do not impose any "confusing" burden on tobacco advertisers, let alone impede "commerce and national economy," 1965 Act, § 1331.

As the Second Circuit explained, in upholding a New York City ordinance barring outdoor and some indoor tobacco advertisements within 1,000 feet of schools and playgrounds:

> Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without [New York City's ordinance], a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances.
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> *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F. 3d 100, 109 (2d Cir. 1999).

How can the Petitioners now claim before this Court that it is a "crippling" burden, (Pet'rs' Br. at 13), for them to honor the Commonwealth's storefront sign regulations when the Petitioners under the MSA have already agreed not to use off-premises billboards? Massachusetts simply closed a loophole by preventing the use of storefront signs near schools and playgrounds. Similarly, the only burden created by the in-store regulations is that retail store owners near playgrounds and schools will have to ensure that tobacco ads are kept at least five feet off the floor. In short, the Regulations do not impose any discernible burden on tobacco manufacturers, their advertising agencies or the nation's economy.

C. The case law on § 5(b) strongly supports the conclusion that Congress intended to preempt only those requirements or prohibitions that affect the content of tobacco brand advertising.

The content/location distinction has been embraced by the U.S. Courts of Appeals for the Fourth, Seventh and Second Circuits, as well as the First Circuit in the case at bar. *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F. 3d 1318, 1324 (4th Cir. 1995) (*"Penn Advertising I"*); *Fed'n of Adver. Indust. Representatives v. Chicago*, 189 F.3d 633, 638-639 (7th Cir. 1999)(*"FAIR"*); *Giuliani*, 195 F. 3d at 105-106, 109-110; *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 39-41 (1st Cir. 2000). These jurists concluded that Congress never intended to tread upon the states' traditional authority to restrict advertising by zoning or similar laws.

Against the weight of this authority is the dictionary-as-law analysis of *Lindsey v. Tacoma-Pierce County Health Dept.* 195 F. 3d 1065 (9th Cir. 1999), and its jurisprudential soul-mate, *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998). The *Burlington* case merits particular consideration because it offers a textbook example of what can go wrong when a judge applies a "plain meaning" approach to the preemption language of § 5(b), while refusing to consider what Congress was really trying to accomplish.

The City of Burlington, like Massachusetts, had regulated point-of-purchase and outdoor sign tobacco advertising and had prohibited the distribution of free samples of tobacco products. *Id.* at 414-415. Since § 5(b) applies to "advertising and promotion," and handing out free cigarettes is a well-recognized method of advertising and promoting the use

of cigarettes,[4] the district court judge concluded that Burlington's anti-sampling prohibition "directly affects the advertisement and promotion of cigarettes, and consequently, however well advised the measures are, they are preempted by the FCLAA." *Id.* at 420.

That portion of the *Burlington* opinion sharply illustrates how relying solely on the plain meaning of § 5(b) can lead to results that are destructive of our federalism. Whatever the plain meaning of "advertising and promotion," Congress never meant to take away the power of local communities to prevent the free distribution of cigarettes to sixth graders. The full text and legislative history of § 5(b) makes that point abundantly clear. Senate Report 91-566 states that preemption was not intended to interfere with "police regulations" such as public smoking, taxation or "the sale of cigarettes to minors." 1970 U.S.C.C.A.N. at 2663. The 1969 Act itself defines "sale" to *include* "sampling or any other distribution not for sale." 15 U.S.C. § 1332(6).

If the Senate Report says that state and local regulation of the "sale of cigarettes to minors" is not preempted, and sampling is defined within the 1969 Act to be a sub-species of sale, then sampling regulations should not be preempted. *See generally* Donald W. Garner, *Tobacco Sampling, Public Policy and the Law*, 11 J. Health Politics, Pol'y & Law, 423 (1986). Congress did not take leave of its senses. It never meant to give

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[4] The Tobacco Institute's Code of Cigarette Sampling Practices states that "[c]igarette sampling is a form of cigarette advertising." The Tobacco Institute, *Code of Cigarette Sampling Practices* (1983). After the MSA took effect in 1998, the industry's expenditures on sampling soared, from $14.4 million in that year, to $33.7 million in 1999 – an increase of 133.5 percent. Federal Trade Commission, *Federal Trade Commission Cigarette Report for 1999* (2001).

the tobacco industry the right to subvert laws in all fifty states that prohibit distribution of cigarettes to minors. *See* Garner & Whitney, *supra*, at 498 n. 103. Yet with its plain meaning blinders on, the *Burlington* court turned § 5(b) into a parody of the true will of Congress.

Just as the troubled phrase in § 5(b), "with respect to the advertising or promotion of any cigarettes," was not intended to repeal juvenile sampling laws, it also was not intended to preempt state or local zoning of outdoor and in-store tobacco ads. By "advertising and promotion," Congress was simply referring to the message, not the media that carry the message or locations where the message may be placed.

While this Court had no need to consider the critical distinction between content and location regulation in *Cipollone*, the opinions and outcome in that case are fully consistent with such a distinction. The question in *Cipollone* was whether § 5(b), under either the 1965 Act or the 1969 Act, preempted state common-law tort and breach-of-warranty claims. *Cipollone*, 505 U.S. at 512. The Court found that some claims were not preempted because they were not "imposed under state law," *id.* at 525 (plurality opinion), or were not "based on smoking and health." *Id.* at 528-29 (plurality opinion). All of the claims that the Court found were preempted under § 5(b), however, were aimed at regulating the *content* of tobacco advertising by challenging, varying or supplementing required statutory health warnings.

With respect to the failure-to-warn claims, for example, the plurality held that, "insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted." *Id.* at 524. Similarly, it held that a fraudulent misrepresentation

claim was preempted because it was "predicated on a state-law prohibition against statements *in* advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527 (emphasis added).

By refusing to hold the tobacco companies liable for health claims based on the failure of cigarette advertising to carry warnings over and beyond those required by the federal government, *Cipollone* recognized the central preemption goal of Congress: to have but a single federal master to determine what must and must not be said about the dangers of smoking in cigarette ads and on packaging.

In the entire case law on § 5(b) to date, not one opinion has unearthed a single fact in the legislative history that is inconsistent with the compelling distinction between regulation of advertising content and regulation of advertising placement. Rather, the legislative history and prevailing case law alike point to the conclusion that, by "requirement," Congress intended to preempt state rules mandating the inclusion of health content in tobacco advertising, and by "prohibition," Congress intended to preempt state rules mandating the exclusion of health-related content from tobacco advertising. Since the Massachusetts Regulations do not impose either a requirement or a prohibition that relates to tobacco advertising content, they are not preempted.

To find that the Regulations are preempted, this Court would have to conclude that it was the "clear and manifest purpose of Congress" to strip the states of the power to create zones where children may learn and play free of solicitations to smoke. *Cipollone,* 505 U.S. at 518. Yet not one shred of proof of such a purpose has emerged from the litigation arising out of Baltimore, Chicago, Tacoma-Pierce County, Burlington, New York or Massachusetts.

Congress was concerned with protecting "commerce and national economy." 15 U.S.C. § 1331. State laws that only proscribe the location of outdoor and in-store signs do not in any way threaten the national economy – as this Court unanimously decided in *Packer*, 285 U.S. at 111. On the contrary, such laws are in perfect harmony with Congress's overarching purpose. It was, after all, the very same 1969 Act that outlawed cigarette advertising on television and radio, thereby shielding children from being involuntarily exposed to such ads through these similarly intrusive media. 15 U.S.C. § 1335; *see also Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), aff'g without opinion *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

In sum, there is no clear and manifest sign – indeed, there is no sign at all – that Congress wanted to destroy the longstanding right of state and local governments to zone the location of cigarette advertising, any more than it wanted to destroy Utah's 70-year-old ban on outdoor and in-store advertising or nullify state laws banning sampling to minors. On the contrary, a reasoned understanding of the way Congress intended the 1969 Act to apply leads to the common-sense conclusion that Congress did not disturb the right of the people of Massachusetts to decide where cigarette advertising may be displayed in their state.

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT, SINCE THEY ARE CAREFULLY DRAWN TO PROTECT CHILDREN FROM EXTRAORDINARILY HARMFUL MESSAGES IMPOSED ON THEM BY INTRUSIVE AND UNAVOIDABLE MEANS OF ADVERTISING.

The tobacco industry urges this Court to declare that the marketplace of products and the marketplace of ideas should be accorded the same First Amendment protection. Amici urge this Court to declare that children are not to be treated as adults.

"The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted to political speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring). This equation of cigarette advertising and child pornography, written by the author of the commercial speech doctrine, *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), animates the First Amendment argument of Amici. Whatever may be the fate of the commercial speech doctrine, children must be accorded a special place in the firmament of the First Amendment.

Recognizing that Respondent and other amici will defend the continued vitality of the commercial speech doctrine, Amici advance an alternative and complementary argument in favor of upholding the Regulations: Irrespective of whether the Court's starting point is "strict scrutiny" or the "intermediate scrutiny" test for commercial speech, the Regulations are entitled to extraordinary judicial deference. Under settled First Amendment principles, the Massachusetts Regulations should be upheld, first, because they are narrowly

aimed at protecting children from messages promoting the use of a substance so uniquely dangerous, lethal and addictive that it cannot be legally sold to them. Second, the Regulations should be upheld because they apply only to the most intrusive types of media – billboards, outdoor signs and in-store ads – that children cannot avoid.

A. This Court's well-settled rule giving government considerable latitude to protect children from indecent speech should be extended to government measures aimed at protecting children from speech that can lead to their death.

This Court has long recognized that governments, in their role as *parens patriae*, may impose reasonable restrictions on First Amendment rights when necessary to protect children. In *Prince v. Massachusetts*, it proclaimed:

> The state's authority over children's activities is broader than over like actions of adults . . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.
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> 321 U.S. 158, 168 (1944).

The Court later applied this principle to state-imposed restrictions on freedom of speech. In *Ginsberg v. State of New York*, 390 U.S. 629, 631 (1968), it upheld a law prohibiting the sale to minors of materials depicting female nudity in a manner appealing to prurient interests. Citing *Prince*, the Court held that the state's power to protect children placed limits on the

seller's First Amendment right to peddle such materials. *Id.* at 638-641. Justice Stewart's concurring opinion tellingly observed that a child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."*Id.* at 650 (Stewart, J., concurring).

The *Ginsberg* principle has been upheld by the Court on numerous occasions, in the context of protecting children from indecent speech. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (Breyer, J., plurality). *See also Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), aff'g without opinion *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585-86 (D.D.C. 1971) (upholding provision of 1969 Act outlawing cigarette advertising on television and radio, in part because evidence showed that they were "particularly effective in reaching a large audience of young people").

Two of this Court's more recent opinions have reaffirmed the vitality of this doctrine, making clear that the need to protect impressionable youth from harmful speech merits special consideration in its First Amendment calculus even as they struck down regulations that impermissibly constricted the flow of communication to adults.

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), this Court voided the Communications Decency Act ("CDA"), which imposed criminal penalties on any individual who knowingly transmitted obscene or indecent messages over the Internet to anyone under 18 years of age. The Court upheld the central tenets of *Ginsberg* and *Pacifica*, carefully explaining a host of distinctions. *Id.* at 864-871. The CDA was both vague, *id.* at 871-874, and overbroad,

threatening to visit criminal sanctions upon adults who transmitted the most marginally indecent speech to an audience that included even one individual under age 18. *Id* at 876-878. The majority characterized it as a "content-based blanket restriction on speech." *Id.* at 868. While the CDA may well have chilled the free speech rights of adults, the Massachusetts Regulations unquestionably leave adults with ample alternative avenues for obtaining tobacco product information, are certain of definition and do not deter Petitioners from propagating their ads through other media and venues.[5]

In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878 (2000), the Court struck down a federal statute that sought to protect children from indecent images that they might see on cable television from "signal bleed." The law required cable television operators to either fully scramble their sexually-oriented programs or broadcast them late at night. The majority opinion implicitly acknowledged that the government's interest in protecting children from seeing or hearing offensive material without parental consent constituted a compelling Government interest. 120 S. Ct. at 1885-1887.[6] It found the statute unconstitutional

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[5] Justice O'Connor's partial concurrence is especially noteworthy here, as it reviews the states' ubiquitous use of zoning laws to create "adult zones," which deny minors access to harmful speech. *Id.* at 887-889 (O'Connor, J., concurring in part and dissenting in part). She observes that such laws are valid if they keep children away from speech that they have no right to obtain, without unduly restricting adults' right to the same speech. *Id.* at 888-889 (O'Connor, J., concurring in part and dissenting in part). By this standard, which is fully consistent with the majority opinion, the Regulations clearly pass First Amendment muster.

[6] Justice Breyer's dissenting opinion expressed concern that the majority opinion carried the opposite implication. *Id.* at 1901

because of the ready availability of a less restrictive alternative (blocking undesired channels by parental request) and the Government's failure to prove that the problem was pervasive and that the less restrictive alternative was inadequate. *Id.* at 1888-1892. Even at that, four members of this Court concluded that "the special need to protect children," *id.* at 1904 (Breyer, J., dissenting), along with serious questions regarding the effectiveness of these alternatives, *id.* at 1902-1903 (Breyer, J., dissenting), should have dictated a different result.

In contrast to the alternatives available to parents who wish to protect their children from signal bleed, there is no less restrictive means of blocking children's access to harmful solicitations to use tobacco. Parents cannot be expected to blindfold their children before sending them out to play or allowing them to enter a convenience store. What else was the Commonwealth supposed to do to protect children from exposure to outdoor and in-store tobacco advertising, after finding it was a pervasive problem in Massachusetts? (J.A. at 105-106.) The state did not prohibit all storefront billboards, only those near schools and playgrounds. The state did not eliminate in-store ads, it simply moved them away from children's eye level.

(Breyer, J., dissenting) (citing majority opinion at 1891-1892). Respectfully, this concern appears to be unwarranted. The majority simply opines that, where the Government has at its disposal a much less restrictive alternative that allows parents to block the offending speech, its "interest in *substituting itself* for informed and empowered parents . . . is not *sufficiently* compelling to justify this widespread restriction on speech." *Id.* at 1892 (emphasis added). This does not signal the Court's abandonment of the well-settled rule of giving special consideration to regulations aimed at protecting children from harmful speech.

Reno and *Playboy* reaffirm this Court's view that carefully drawn government measures to protect children from harmful speech are accorded greater latitude than similar measures imposed on the general population. The same state paternalism that it rightly criticizes when imposed on adults, *see, e.g., Virginia State Bd.*, 425 U.S. at 770, is a virtue when appropriately applied to children. The key consideration is whether the law at issue "unduly restrict[s] adults' access to constitutionally protected speech," *Reno*, 521 U.S. at 889 (O'Connor, J., concurring in part and dissenting in part) – which the Massachusetts Regulations plainly do not.

Carefully drawn state measures, aimed at protecting children from solicitations to use an addictive product that can kill them, are deserving of at least the same latitude as that given to measures that seek to shield children from indecent speech. In *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), the Fourth Circuit Court of Appeals adopted that reasoning in upholding Baltimore's restrictions on outdoor sign alcohol advertising. It stated that its decision "conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." *Id.* at 329.[7] The court supported its decision by citing to this Court's decisions on indecent speech. *Id.* at 329-30.

Like Baltimore's ordinance, the Massachusetts Regulations are not in violation of the First Amendment for the very same reason that an ordinance prohibiting outdoor signs

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[7] The same rationale was summarily applied to Baltimore's restrictions on outdoor sign tobacco advertising. *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996) (*Penn Advertising II*).

displaying full frontal nudity, or an ordinance limiting the display of pornographic magazines in stores to "adults only" sections, are constitutionally authorized. *See Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). So long as adults can receive adult messages, children can be shielded from adult messages.

The argument for recognizing the authority of governments to protect children from uniquely dangerous messages is even more compelling when the regulation stands on a strong empirical footing. This Court's recognition that youngsters may suffer psychological harm when they view indecent images or hear indecent speech was based on common sense and experience; no proof was provided, nor was it needed, as the Court observed in *Ginsberg*, 390 U.S. at 641-642. In contrast, there is no shortage of proof that tobacco advertising plays a significant role in luring children into the trap of nicotine addiction. Both the FDA and the U.S. Surgeon General, after exhaustive study, have concluded that advertising plays a substantial role in influencing children to begin using tobacco. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed Reg. 44,396, 44,466 (1996)("FDA Regulations"); U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* iii (1994)("1994 Surgeon General's Report"). These governmental findings are confirmed by overwhelming social science evidence proving the link between tobacco advertising and experimentation with, and then addiction to, tobacco products by minors. (J.A. at 104-125.)

Most of the victims of tobacco advertising are minors. The average age of smoking initiation is *fourteen*. 1994 Surgeon General's Report, at 41. Over 80% of all tobacco users

first began using tobacco before turning eighteen. *Tobacco Use Among High School Students–United States, 1997*, Morbidity & Mortality Wkly. Rep. (U.S. Dep't of Health & Human Servs., Apr. 3, 1998), at 229. Overall, 42.7% of high school students use some form of tobacco. *Id.* at 230.

Precisely because children "lack the ability to assess and analyze fully the information presented through commercial media," *Anheuser-Busch*, 101 F.3d at 329, they are more likely to fall prey to tobacco advertising messages than adults and begin experimenting with tobacco use before developing the intellect needed to fully appreciate the consequences of that decision. Seventy percent of smokers aged 12 to 17 say that they already regret their decision to smoke and 66% say they want to quit. FDA Regulations, *supra*, at 44,398. Thus, by the time young smokers reach adulthood, they are already bound by the garrote of nicotine addiction. "[A]n adolescent decision made as an 11- or 12-year old is going to result in a painful, premature and needless death for over five million of today's children . . . . They will, on average, die 12 years earlier." *News and Views From the Franklin County Prevention Institute*, Reuters, Nov. 14, 1996 (quoting Michael Ericksen, Director of the Office of Smoking and Health, Centers For Disease Control and Prevention).

Given both the breadth and the gravity of this public health menace, one that is literally a matter of life and death to millions of young people, and given that advertising plays a significant role in fostering the problem among children, this Court should extend its "special solicitude" for child-protection measures to the Massachusetts Regulations.

In their brief, Petitioners do not acknowledge this Court's extraordinary deference toward child-protection measures but attack it indirectly, (Pet'rs' Br. at 36-38),

portraying themselves, rather than their hapless adolescent customers, as victims. They claim that "virtually no public display of favorable images of tobacco will be permitted in Massachusetts," (Pet'rs' Br. at 36), and equate the Regulations with a "blanket ban." (Pet'rs' Br. at 38.) That is false. The industry has in fact retained broad alternative avenues of communication to convey their advertisements to adult consumers – not only storefront signs outside the forbidden zones, and in-store ads placed more than five feet above the ground, but also newspapers, magazines, direct mail, promotional clothing, the Internet, etc.

As the FTC recently revealed, the tobacco manufacturers have exploited such alternative avenues with a vengeance: Total advertising and promotional expenditures in the cigarette industry rose a remarkable 22.3 percent in 1999 alone. The $8.24 billion spent was "the most ever reported to the Commission." Federal Trade Commission, *Federal Trade Commission Cigarette Report for 1999* 2 (2001). The industry spent $51 million on newspaper ads, $377.4 million on magazine ads, $38.7 million on point-of-sale ads, $3.54 billion on promotional allowances to retailers, $33.7 million on free cigarette samples distributed to the public and $355.7 million on mail distribution and promotional events. *Id.* at 3-4. Clearly, the industry will have no trouble getting its message across to adult consumers in Massachusetts. *Compare 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down statute that barred all advertising of alcohol prices except in-store ads, on grounds that it amounted to a "blanket ban" on commercial speech).

Finally, Petitioners' reliance on *Carey v. Population Services International*, 431 U.S. 678 (1977), is actually supportive of the Regulations, for it precisely illustrates what the case at bar is not about. (Pet'rs' Br. at 36-37.) *Carey*

concerned a complete ban on all advertising of contraceptives in the State of New York, *id.* at 681; the Massachusetts Regulations merely restrict the advertising of tobacco products to particular media and locations. In *Carey*, the Court rejected as unsubstantiated the government's argument that restrictions on contraceptive ads were needed to protect children from unwholesome influences, *id.* at 694-698, 701; in the instant case, Massachusetts has provided a wealth of data showing that tobacco advertising poses a grave threat to children's health. (J.A. at 102-127.) In *Carey,* the ads promoted products and services that enjoy constitutional protection for their sale, *id.* at 701; tobacco ads, far from enjoying such added constitutional protection, promote a deadly product that governments have every right to ban altogether. *Austin v. Tennessee*, 179 U.S. 343 (1900).

In *Carey*, the State of New York attacked contraceptive advertising on the ground that it might be offensive and embarrassing and might legitimize illicit sexual activity among young people. 431 U.S. at 701. This Court, in a footnote, viewed such arguments as attacking the ideas conveyed in the ads, rather than addressing any commercial aspect. *Id.* at 701 n. 28. Seizing on that footnote, Petitioners argue that the Regulations, too, are an attack on their ideas, rather than on the commercial aspect of their ads. (Pet'rs' Br. at 37).

However, the only idea being suppressed by Massachusetts is the idea that tobacco is a desirable product children should use. There are no constitutionally sacrosanct messages intermingled with the sales pitch and no constitutional rights implicated beyond the First Amendment rights at issue.

Thus, unlike the sweeping prohibition at issue in *Carey*, the Commonwealth's Regulations are truly deserving of this

Court's special solicitude for measures that protect children from distinctly harmful speech.

B. The Regulations pass First Amendment scrutiny for the additional reason that they target speech disseminated by intrusive media, which impose harmful messages on children in a manner that cannot be avoided.

If governments possess considerable authority to protect children from patently harmful speech, they possess still greater authority to protect children from such speech when it is disseminated by intrusive media. This Court has long recognized the government's authority to protect the right of all people, young and old alike, to go about their lives without having speech involuntarily imposed on them.

In *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court upheld Utah's ban on all outdoor tobacco sign and point-of-purchase advertising, largely on the ground that the law was aimed at protecting minors. *Id.* at 108-110. The Court also emphasized that, while most advertising "is ordinarily seen as a matter of choice on the part of the observer," "[b]illboards, street car signs, and placards and such are in a class by themselves. . . . to be seen without the exercise of choice or volition on their part." *Id.* at 110 (citation omitted).

Although *Packer* was not a First Amendment case, the Court has subsequently applied this distinction between intrusive or "captive audience" speech, and speech that the recipient chooses to receive, in upholding government restrictions on speech against First Amendment challenges. In *Kovacs v. Cooper*, it upheld an ordinance prohibiting the use of sound trucks, on the grounds that people cannot escape messages propagated by such means. 336 U.S. 77, 86-87

(1949). In *Lehman v. City of Shaker Heights*, the Court upheld a city's refusal to sell advertising space on mass transit vehicles to candidates for public office, largely because "[t]he streetcar audience is a captive audience." 418 U.S. 298, 302 (1974) (plurality opinion); *id.* at 306-307 (Douglas, J., concurring) (emphasizing captive audience rationale). *Accord Breard v. Alexandria*, 341 U.S. 622, 644 (1951) (upholding municipality's authority to ban door-to-door canvassing); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-737 (1970) (upholding federal statute requiring direct mail advertisers of sexually provocative material to remove persons from mailing list at the request of the addressee).

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld the FCC's authority to sanction a radio station that broadcast offensive language at a time when children were undoubtedly in the audience. A vital part of the Court's rationale was the "uniquely pervasive presence" of the broadcast media and the fact that listeners cannot avoid the indecent speech, at least not until they have already been subjected to a dose of it. *Id.* at 748-749.

The government's considerable authority to protect children from speech that is both harmful and intrusive was recently reaffirmed by this Court in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), where it held that "the need to protect children from exposure to patently offensive sex-related material" amply justified a federal statute allowing cable TV systems to ban such indecent programs over leased access channels. 518 U.S. at 743 (Breyer, J., plurality). The Court upheld the law – even though it inconvenienced adults who would therefore have to rent videotapes in order to view such material – largely because such programming can be seen by children "generally

without sufficient prior warning to allow the recipient to avert his or her eyes or ears." *Id.* at 744.

Petitioners fail to explain how children can avert their eyes from convenience store billboards when they walk to school or can fail to notice point-of-purchase cigarette displays that cover shops like wallpaper.

Conclusion

The Massachusetts Regulations are fairly balanced to protect children from harmful solicitations to use tobacco, while preserving the right of adult consumers to receive tobacco advertising. Accordingly, Amici respectfully request that this Court affirm the judgment of the Court of Appeals.

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APPENDIX A

DESCRIPTION OF INDIVIDUAL AMICI CURIAE

Amicus American Medical Association (AMA), with a membership of more than 280,000 physicians, is the largest private nonprofit organization of physicians in the United States. The AMA's mission is to promote the science and art of medicine and the betterment of the public health. The AMA has long opposed tobacco use based on the massive body of scientific evidence that tobacco is addictive and kills smokers. The AMA appears as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and 50 state medical societies, organized to represent the interests of organized medicine in the courts.

Amicus American Heart Association is a not-for-profit health organization whose mission is to reduce disability and death from cardiovascular disease and stroke.

Amicus American Lung Association is a voluntary health organization whose mission is to prevent lung disease and promote lung health through public education, research and advocacy.

Amicus American Cancer Society (ACS) is a nonprofit public health organization with a membership of over 2.3 million volunteers throughout the country, including over 50,000 physicians. ACS is committed to the goal of controlling and eliminating cancer through research, education, advocacy and service. Research conducted and supported by ACS since

the1950s has played a pivotal role in identifying the use of tobacco products as a major cause of cancer. The ACS joins this brief on behalf of the National Home Office of the American Cancer Society and its New England Division.

Amicus Center for Science in the Public Interest advocates public health policies to reduce alcohol problems and has led efforts to restrict youth-oriented advertising of alcoholic beverages.

Amicus Massachusetts Medical Society, founded in 1781, is the oldest continuously operating medical association in America, with more than 17,000 physician and student members. Its chartered purpose is "to do all things as may be necessary and appropriate to advance medical knowledge, to develop and maintain the highest professional and ethical standards of medical practice and health care, and to promote medical institutions formed on liberal principles for the health, benefit and welfare of the citizens of the commonwealth." The Society, in the interest of patients and public health, has actively supported efforts to regulate tobacco.

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-v.-

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the
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BRIEF OF *AMICI CURIAE*, CITY OF NEW YORK & PETER F. VALLONE, SPEAKER OF THE CITY COUNCIL, AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, IN SUPPORT OF RESPONDENT

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March 23, 2001

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INTERESTS OF *AMICI CURIAE*

The City of New York and Peter F. Vallone, the Speaker and Majority Leader of the City Council of the City of New York (hereafter "the NYC *amici*"), and the Mayor and City Council of Baltimore ("the Baltimore *amici*"), submit this brief in support of affirmance of the judgment of the United States Court of Appeals for the First Circuit in *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *cert. granted sub nom. Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 755 (2001).[1] Both the NYC and Baltimore *amici* have strong interests in this case.

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[1] Pursuant to Rule 37.6 of this Court, the NYC and Baltimore *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives

The NYC *Amici*

The City of New York and the City Council, whose Speaker and Majority Leader, Peter F. Vallone, has sponsored much of the City's legislation in this area, have taken a lead role in enacting a series of laws intended to protect the City's children from the detrimental effects of illegal sales and distribution of tobacco products.

In fact, New York City has a law quite similar to the one at issue herein, Local Law 3 of 1998, the Youth Protection against Tobacco Advertising and Promotion Act ("the NYC Act").[2] As described more fully below, the NYC Act is designed to promote enforcement of local laws banning the sale or distribution of tobacco products to minors and to protect young people, who are extremely susceptible to outdoor and publicly-visible tobacco product advertisements. Accordingly, the NYC Act places reasonable restrictions on the location of such advertisements aimed at or regularly seen by youth near schools, playgrounds and daycare centers.

A brief review of the background of the NYC Act is useful. For some time, pursuant to New York Penal Law, it has been a misdemeanor in the State of New York to sell or cause to be sold tobacco to a child under the age of eighteen. *See* N.Y. Penal Law, § 260.21(3). In more recent years, the N.Y. City Council has enacted local legislation to control the sale and distribution of tobacco products to minors.

For example, in 1990, concerned that free cigarette samples were regularly distributed and that teenagers often obtained them, the N.Y. City Council prohibited all distribution of free tobacco products for commercial purposes

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made any monetary contribution to the preparation or submission of this brief.

[2] *See* N.Y.C. Admin. Code, § 27-508.1 *et seq.*.

in public places, except at those places, such as stores, which are "point of sale" locations. N.Y.C. Admin. Code, § 17-176. Also prohibited are the distribution of tobacco products from vending machines in all public places, except taverns, because such machines had provided unsupervised minors easy access to cigarettes. *Id.*, § 17-177.

In a further effort to limit the availability of tobacco products to minors, the 1992 Tobacco Product Regulation Act requires retail sellers of tobacco products to be at least 18 years of age or under the supervision of someone at least 18 years old. *Id.*, § 17-619. Such retail sellers must obtain photographic proof-of-age from all purchasers, unless they reasonably appear to be at least 25 years of age, and to post certain warning signs on the prohibitions on sale of tobacco products to minors. *Id.*, § 17-620.

Notwithstanding these laws, retail stores remained substantially non-compliant despite repeated enforcement and educational efforts. These included undercover investigations and sweeps utilizing student volunteers, numerous press releases, over 1000 inspections, issuance of hundreds of citation violations and letters to licensed retailers, and license suspensions.

Thus, on December 17, 1997, the N.Y. City Council passed the NYC Act, which restricts, *inter alia*, outdoor tobacco product advertisements (other than those on moving vehicles) within 1000 feet of various locations where children congregate, *i.e.*, any school building, playground, child day care center, amusement arcade or youth center.[3]

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[3] The NYC Act also concerns other matters, including provisions concerning certain promotional practices of cigarette companies, which provisions were never challenged. Accordingly, all references to the NYC Act refer only to those portions restricting the location of outdoor and publicly-visible cigarette advertising.

In addition to the parallel 1000-foot protected zones, both Massachusetts and New York City limit some indoor point-of-sale cigarette advertising in retail stores in those zones, when such advertisements are publicly-visible from the street. The NYC Act permits cigarette advertisements to be placed anywhere in retail stores as long as the advertisements are either (i) parallel to the street and facing inward, or (ii) affixed to a wall panel or similar structure that is perpendicular to the street or are more than five feet from the store's door or window. However, Massachusetts is more restrictive, prohibiting placement of such advertisements anywhere in the store, facing outward or visible from outside or at a height lower than five feet from the floor.[4]

In the comprehensive "Declaration of legislative findings and intent," comprising section 1 of the Act, the N.Y. City Council cited evidence that certain tobacco product manufacturers have admitted engaging in "strategies designed to advertise and promote tobacco products to minors" and found that "such strategies undermine state and local laws prohibiting the sale or distribution of tobacco products to minors."

Of great concern to the N.Y. City Council, ample data established a dramatic increase in teenage smoking, with statistics gathered by the federal Centers for Disease Control and Prevention ("CDC") demonstrating that, although the rate of smoking among adults decreased by 50% between 1971 and 1993, the rate of smoking among all high school students increased by over 26% from 1991 to 1996. The Council emphasized that studies demonstrate that "nearly 90% of all smokers begin to smoke prior to the age of 18 and that the average child smoker starts daily smoking by the age of 14."

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[4] Apparently, Massachusetts was concerned about the phenomenon, which New York City has also noted, *i.e.*, cigarette advertisements are regularly placed at the level of a child's eyes.

In New York City, as reported by the Department of Consumer Affairs, 200 children began to smoke every day.

This dramatic increase in teenage smoking occurred even while all the states have had prohibitions in effect on the sale or distribution of cigarettes and other tobacco products to minors and despite a voluntary industry code to prohibit tobacco advertisements that appeal to minors. Indeed, this Court recently recognized that "...tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

The N.Y. City Council relied on substantial evidence of the major role played by tobacco advertising and promotion in tobacco use by minors, including various studies from the Journal of the American Medical Association, reports of the National Institute of Medicine and the CDC finding that advertising and promotion "...increase tobacco use by youths...." There was also ample testimony and other reports from experts, newspaper and scientific journal articles, and other written submissions, which provided compelling data that advertising of tobacco products has played a significant role in teenage tobacco use and smoking patterns and that there is a pervasive presence of tobacco advertising, obviously targeting youth, in the community.

Perhaps most tellingly, even professionals in the advertising business agreed that the goal of advertising is to target teenagers. For example, in one statement by a tobacco product manufacturer, "Liggett acknowledge[d] that the tobacco industry markets to 'youth,' which means those under 18 years of age...." Furthermore, in one survey of 300 advertising executives, 68% stated that the "tobacco industry has as a goal for its advertising marketing cigarettes to teenagers who already smoke," 59% stated that "marketing to non-smoking teenagers is a goal," and 71% stated that

advertising makes smoking more appealing to children. Such statements were confirmed by other revelations in tobacco company documents discussing strategies to target youth in cigarette advertisements.[5]

Accordingly, the City of New York was and remains very concerned about the pervasive presence of tobacco advertising, obviously targeting youth in the community, particularly near schools. Based upon all the above evidence and the concern of local public officials to decrease young people's temptation to become engaged in unlawful conduct and to better secure youth's safety and welfare, the N.Y. City Council determined to enact constitutionally permissible restricts on tobacco product advertising and promotion.

Following a challenge by local retailers, on October 25, 1999, the U.S. Court of Appeals for the Second Circuit held that, with one small exception, the N.Y.C. Act was not pre-empted under the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1331 *et seq.*.[6] It

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[5] The N.Y. City Council's findings also cited much of the evidence contained in the 1996 Food and Drug Administration ("FDA") proposed rules on advertising and promotion of tobacco, including evidence that such advertising particularly targeted youth, and often specifically minority youth, and that these campaigns have been successful. This Court subsequently found that the FDA lacked administrative authority to act in this area and issue such rules. *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

[6] The exception pertained to "tombstone" provisions, which Massachusetts also had, pursuant to which retail stores could post "tombstone" signs notifying the public that tobacco products/cigarettes were sold at the premises. However, those provisions were challenged and then struck down on pre-emption grounds by, respectively, the District Court for the District of Massachusetts (in a portion of its ruling which was not appealed) and by the Second Circuit. Accordingly, such provisions are not

remanded the case for further proceedings on the First Amendment issue. *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000) ("*Greater N.Y.*").[7]

The Baltimore *Amici*

The Mayor and the City Council of Baltimore ("Baltimore") have a strong interest in the present case, which may have a direct effect on the laws presently in force in Baltimore.

Since 1992, it has been illegal in the State of Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md. Ann. Code, Art. 27, Sec. 404 (1992). Effective October 1, 1994, Maryland also prohibited minors from using or possessing "any tobacco product." Md. Ann. Code, Art. 27, Secs. 404 and 405A (Supp. 1994). A few months earlier, Baltimore, in a further effort to reduce the illegal consumption of cigarettes by minors, had enacted Ordinance 307 prohibiting the placement of any sign that "advertises cigarettes in a publicly visible location, i.e. on "outdoor billboards, sides of building[s], and free standing signboards."[8]

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before this Court and were no longer at issue when the First Circuit issued its decision.

[7] Following further briefing, upon learning that a petition for certiorari had been filed in this case, in August 2000, the U.S. District Court for the Southern District of New York (Batts, D.J.) placed the case on the suspense calendar pending resolution by this Court.

[8] The principal provision of Ordinance 307 provides:

Cigarette advertisements. No person may place any sign, poster, Placard, device, graphic display, or other form of advertising that

The prohibition contained in Ordinance 307 paralleled the scope and language of Baltimore City Ordinance 288, also enacted in 1994, which regulated the advertising of alcoholic beverages. The exceptions to the prohibition in Ordinance 307 mirrored the exceptions in Ordinance 288 and permitted such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contained an exception permitting advertising in certain commercially and industrially-zoned areas of Baltimore.

Before enacting Ordinance 307, the Baltimore City Council received testimony and studies which detailed the correlation between cigarette advertising and the consumption of cigarettes by minors. As expressed in the preamble to the ordinance, the Baltimore City Council found that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It also noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear to 'open the door' for use of other harder drugs at a later date." To reduce the illegal consumption of cigarettes by minors, the Baltimore City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements.

On the day that Ordinance 307 went into effect, Penn Advertising of Baltimore, Inc., filed an action in federal court

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advertises cigarettes in a publicly visible location. In this section, "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30, §10.0-1(1). The ordinance, by its own terms, became effective on April 6, 1994.

to enjoin the enforcement of the ordinance and to obtain a declaratory judgment that (1) the ordinance was preempted by §5(b) of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. §1334(b), and by the Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violated the First and Fourteenth Amendments of the U.S. Constitution. The District Court granted summary judgment in favor of Baltimore.

In its subsequent appeal to the U.S. Court of Appeals for the Fourth Circuit, Penn Advertising claimed that Ordinance 307 was void because Baltimore's authority to enact such a law was preempted by §5(b) of the FCLAA which mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§1331-1340. It also argued that, because the ordinance's prohibition was based on health concerns, it was preempted by the federal statute, relying exclusively on the analysis of §5(b) by this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Applying the *Cipollone* analysis to Ordinance 307, the Fourth Circuit held that the FCLAA did not preempt the ordinance because the ordinance limits only the *location* of signs that advertise cigarettes but not their *content* and "[t]he ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*." *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995) (emphasis in original).

The Fourth Circuit also considered Penn Advertising's contention the Ordinance 307 was an impermissible regulation of commercial speech under the four-prong test in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). The principal dispute centered on the third and fourth prongs that questioned whether the

enactment directly advanced the government's stated public interest and whether the enactment was more extensive than necessary to serve that interest. Finding that a logical nexus existed between Baltimore's objective and the means selected for achieving the objective and that the advertising regulation was narrowly tailored to meet the fourth prong, the Fourth Circuit affirmed the judgment of the District Court. *Penn Advertising*, 63 F.3d at 1325-26.

In granting Penn Advertising's petition for writ of certiorari, this Court vacated the judgment and remanded the case to the Fourth Circuit for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). *Penn Advertising of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030 (1996). Upon remand, the Fourth Circuit reaffirmed its prior decision and this Court subsequently denied certiorari. *Id.*, 520 U.S. 1204 (1997).

Baltimore's Ordinance 307 and the Massachusetts regulation at issue in the instant case are similar in that they both limit the advertising of tobacco products and were challenged as being pre-empted by the FCLAA and violating First Amendment rights. As a result of the rulings in *Penn Advertising*, Baltimore has been able to continue to enforce its restrictions on tobacco advertising and to protect minors from the effects resulting from such advertising. Baltimore now has a strong interest in seeing that the Massachusetts law is upheld and thus urges this Court to affirm the decision of the U.S. Court of Appeals for the First Circuit.

SUMMARY OF ARGUMENT

Pursuant to this Court's guiding pre-emption and First Amendment principles, laws such as those of Massachusetts, New York City and Baltimore, are constitutional because they were enacted to further the substantial interests in preventing unlawful sales of tobacco products to minors and in protecting the welfare of children and are narrowly tailored to that effect.

Given that the laws do not proscribe or prescribe any content in tobacco product advertisements, a finding that they are not pre-empted by federal law comports with the FCLAA and this Court's guiding tenets of pre-emption analysis, including those set forth in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (plurality). In fact, although unacknowledged by petitioners, the First Circuit's decision is in ample agreement with the vast majority of Circuit Courts, the Second, Fourth and Seventh, that local laws which merely restrict the location of outdoor and publicly-visible tobacco product advertising are proper exercises of historic state and local police powers and are therefore not pre-empted. So too, the United States has taken that position repeatedly in supporting *amici* briefs in these cases.

Furthermore, such laws do not violate the First Amendment. Petitioners' pleas for this Court to change the standard of review with respect to pure commercial speech should be rejected. This is particularly so in the instant case, given the substantial need to protect children from the aggressive advertising and sales practices targeting youth. Using the traditional four-part test enunciated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), these laws are proper because, *inter alia*, they are appropriately narrowly tailored and do not ban the display of tobacco advertising, but rather restrict it to outdoor locations or those easily visible from outdoors, near a number of carefully-defined locations where children are likely to congregate.

ARGUMENT

STATE AND LOCAL LAWS SUCH AS THE ONE AT ISSUE HERE, WHICH RESTRICT THE LOCATION OF OUTDOOR AND PUBLICLY-VISIBLE TOBACCO ADVERTISEMENTS AWAY FROM AREAS WHERE MINOR CHILDREN CONGREGATE, ARE A PROPER EXERCISE OF HISTORIC POLICE POWERS. SUCH LAWS ARE NOT PRE-EMPTED UNDER THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT AND DO NOT VIOLATE THE FIRST AMENDMENT.

(1)

Based on well-settled principles, state and local laws such as those of Massachusetts, the City of New York and Baltimore are proper exercises of their historic police powers to provide for compliance with their laws and the general welfare of their children that are not pre-empted by the FCLAA.

While the starting point of pre-emption analysis must begin with the text, that interpretation is informed by two presumptions. First, because the States are independent sovereigns, where the exercise of historic state or local police powers is involved, it is presumed that such police powers are not to be superseded "unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality) ("*Medtronic*"); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (plurality opin.) ("*Cipollone*"). That approach is consistent with both federalism concerns and the historic

primacy of state police power regulations. *Medtronic*, 518 U.S. at 485; *California Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316 (1997).

Second, the analysis of the scope of a pre-emption provision is guided by the fact that "the purpose of Congress is the ultimate touchstone" in every case. *Medtronic*, 518 U.S. at 485, citing, *inter alia*, *Cipollone*. Such review includes not only the text but also a review of the statutory framework and the court's reasonable understanding of the way Congress intended the statutory scheme to affect businesses, consumers, and state and local governments. *Medtronic*, 518 U.S. at 485. *See also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Tellingly, petitioners ignore the important principles in *Medtronic*.

In starting the analysis with the language used by Congress, the FCLAA identifies the congressional purpose in 15 U.S.C. § 1331:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling

and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

In keeping with this purpose, the FCLAA requires, *inter alia*, that every package of cigarettes sold or distributed and any advertising of cigarettes in the United States bear, in conspicuous form, one of four prescribed Surgeon General's warnings. 15 U.S.C. § 1333.

The FCLAA then sets forth an explicit pre-emption provision, 15 U.S.C. § 1334(b), as follows: "(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this chapter."

Accordingly, neither the express language of the FCLAA nor its reasonable interpretation pre-empts these laws in light of the Congressional purpose in enacting the FCLAA, to prevent the burden imposed by "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331(2). Congress sought to avoid the imposition of multiple regulatory schemes on cigarette companies that would require different labels and advertisements in each of the fifty states. *Cipollone*, 505 U.S. at 513-15, 529 (state law prohibitions on false statements not pre-empted because they do not create "diverse, nonuniform and confusing standards"). Thus, the focus was on prohibiting state regulation of the content of required warnings on cigarette packages or of cigarette advertisements.

Furthermore, in *Cipollone*, this Court cited with approval the accompanying Senate Report to the FCLAA. *Id.*, 505 U.S. at 529, n.26. Therein, the legislative history of § 1334(b) "suggests that Congress wanted to give ... [police power] regulations a wide berth," given that the Senate Report

notes that §1334(b) is "narrowly phrased" and "would in no way affect [local power] with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations" (*Greater N.Y.*, 195 F.3d 110, *citing* S. Rep. No. 91-566, reprinted in 1970 U.S.C.C.A.N. 2652, at 2663).

Here, the laws at issue do not require a particular message concerning smoking and health to be included in advertising and do not affect the content of the advertising in any way. Nor do they burden interstate commerce or the national economy. Rather, the laws primarily regulate the location of outdoor billboard advertising.

Under longstanding precedent, that is a matter of traditional state and local concern and police powers, not a national concern. Clearly, this zoning type restriction places no burdens on interstate commerce, nor does it impose upon the tobacco companies and their advertisers any requirement that they provide a different advertisement than they provide elsewhere. The restrictions are peculiarly within the sphere of local police powers, a domain which Congress specifically sought to preserve for state and local regulation. Under this Court's precedent, it thus falls outside Congress' Commerce Clause authority and therefore may not be found pre-empted by the FCLAA.

Such laws also accord with localities' well-established interest in the welfare of their children. Indeed, the strong local interest in the general welfare of minors is long-standing and the origins of state and local regulation in New York barring sales of tobacco products to minors date back to at least 1889. *See* Laws of New York, 1889, Chapter 170.

In *Packer Corp. v. Utah*, 285 U.S. 105 (1932) (Brandeis, J.), this Court upheld a corporation's conviction of violating Utah's ban on outdoor tobacco advertising on billboards finding

that such local regulation was "wholly intrastate." *Id.* at 110.[9] More recently, this Court has affirmed the principle that the Commerce Clause authority is limited and that it is not "fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," declining to expand some of its prior precedent which had taken "long steps down that road." *United States v. Lopez*, 514 U.S. 549, 567 (1995).

Cf. Printz v. United States, 521 U.S. 898, 935 (1997) (in holding unconstitutional Brady Act interim provision requiring local chief law enforcement officers to conduct background checks on proposed handgun transferees, Court found "such commands . . . fundamentally incompatible with our constitutional system of dual sovereignty"); *United States v. Locke*, 529 U.S. 89 (2000) (reiterating that an "assumption" of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence, and contrasting that situation to cases involving subjects historically regulated by the States).

Given that a court should avoid, when fairly possible, an interpretation that would either render a statute clearly unconstitutional or even raise serious doubts, this Court should construe the FCLAA to pre-empt only state/municipal regulations of cigarette labels or advertising content. *See, e.g., Edmond v. United States*, 520 U.S. 651, 658 (1997).

Moreover, although virtually unacknowledged by petitioners and their *amici*, the First Circuit's decision is in ample agreement with the vast majority of Circuits, the Second, Fourth and Seventh, that such local laws are proper exercises of long-standing police powers and are not pre-empted under the FCLAA. *See Greater N.Y., supra*;

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[9] As set forth by the Massachusetts Attorney General, the Utah provision, Utah Code 76-10-102 (1995 Replacement) is in effect today (Resp. Br. in Opp. to Certiorari, p. 4).

Federation of Advertising Industry Representatives, Inc. v. City of Chicago, 189 F.3d 633 (7th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000); *Penn Advertising of Baltimore v. Mayor*, 63 F.3d 1318 (4th Cir. 1995), *vac. and remanded*, 517 U.S. 1204 (1996), *aff'd*, 101 F.3d 322 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).[10]

As these Courts have held, the location restrictions at issue do not impose obligations "with respect to" advertising as that phrase is used in §1334(b) and do not touch upon Congress's "comprehensive Federal program" to control cigarette advertising warnings and information. Furthermore, the restrictions do not burden advertisers with a duty to warn nor impose content and format requirements on advertising information, but, instead, regulate placement of signs in a "manner akin to a run of the mill zoning regulation." *Greater N.Y.*, 195 F.3d at 109.

Any argument that such location restrictions lead to the sort of "diverse, nonuniform, and confusing" standards that Congress sought to avoid when it enacted §1334(b) fails. Rather, as the Second Circuit stated:

> Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without [local regulation], a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances. And no party suggests that such *zoning* regulations fall within the intended purview of § 1334(b). We

[10] The only Court to disagree is the Ninth Circuit in *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065 (9th Cir. 1999), *amended*, 203 F.3d 1150 (9th Cir. 2000).

> see no reason to treat the location restrictions before us any differently.

(*Greater N.Y.*, 195 F.3d at 109, italics in original).

In sum, the presumption against pre-emption is particularly strong in the instant case, as the challenged provisions both as to placement of outdoor advertising and as to regulations directed to the safety and welfare of children lay "within the heartland of the states' historic police powers" (*Greater N.Y.*, 195 F.3d at 109, citations omitted).

Finally, in this case, as well as in the Second and Seventh Circuit cases, the United States filed briefs contending that the state and local laws governing the location of such advertising are not pre-empted by the FCLAA. This position, reflecting expertise by the Department of Justice, the agency charged with enforcement of the FCLAA and concerned about its proper application, 15 U.S.C. § 1339, recognizes that Congress meant to preserve the types of police regulatory powers traditionally exercised by the states and localities.[11]

---

[11] The Master Settlement Agreement ("MSA") between the country's largest tobacco companies and numerous states settling financial claims by the states, was entered after New York City's and Baltimore's laws, but before the Massachusetts law. The MSA is designed primarily to compensate states for the health-care costs incurred as a result of tobacco use, although it does include some restrictions on advertising. However, among other limitations, it: 1) includes as private signatories, only certain tobacco manufacturers, not the thousands of other entities involved in the distribution, promotion and sale of tobacco products; 2) does not comprehensively address forms and aspects of advertising that are particularly effective in enticing children to begin tobacco use; and 3) does not contain enforcement mechanisms beyond actions by individual states to enforce the Agreement.

(2)

Despite petitioners' and their *amici*'s urgings, this Court should not employ a "strict scrutiny" test for the purely commercial speech at issue here. Petitioners advocate this radical departure from precedent based on their allegations that the laws are impermissibly content-based and, separately, that they essentially impose a ban on this type of lawful commercial speech. Not only are these characterizations misleading, but also, while this Court has employed "special care" in reviewing regulations which impose blanket bans on commercial speech, it has not departed from the intermediate level of scrutiny appropriate for reviewing restrictions on commercial speech. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 (1996).

Tobacco product advertising is quintessential commercial speech. Such advertisements do "'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citation omitted). Although protected under the First Amendment, such speech is given less extensive protection than non-commercial speech, involving political or social issues of public concern. It is given only "a limited measure of [such] protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) ("*Edge Broadcasting*").

Based on these considerations, this Court's 4-prong test for determining the lawfulness of governmental regulation of commercial speech in *Central Hudson Gas & Electric*

Furthermore, it sets minimum standards and there is nothing in the MSA that precludes state and local governments from enacting statutes or local laws that are stricter or more comprehensive as to injunctive relief, including as to advertising.

Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) has been repeatedly followed. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 184 (1999) (applying *Central Hudson* to regulations restricting advertisements for casino gambling); *Edge Broadcasting* (subject-matter based federal statute which barred the broadcast of lottery advertisements for the Virginia lottery by a radio station licensed in North Carolina, a non-lottery state, did not violate the First Amendment); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (upholding Florida Bar rule prohibiting personal injury lawyers from sending targeted mail solicitations for 30 days following an accident, reaffirming: "Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values....").

The imposition of a strict scrutiny test is particularly inappropriate in this case, where the government has enacted a targeted restriction on commercial speech aimed at children, while leaving ample room for advertising for adults.

In particular, the regulations restrict tobacco advertising directed to children, who cannot legally purchase tobacco products. Indeed, even petitioners admit that "the government has greater power to regulate the content of commercial speech when it "regulates commercial messages to protect consumers from misleading, deceptive, or *aggressive sales practices*, or requires the disclosure of beneficial consumer information." *44 Liquormart*, 517 U.S. at 501, cited in Pet. Br. at 29 (emphasis added).

Thus, in contrast to *44 Liquormart, supra*, where Rhode Island desired to enforce adult temperance through an artificial constraint, New York City's and Baltimore's interests, as Massachusetts', include protecting children who are not yet independently able to assess the value of the message presented and who have been targeted by aggressive marketing. This conforms to this Court's repeated recognition

that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (upholding the FCC's power to regulate indecent speech over the radio, in part because of greater restrictions when the state's interest in protecting children is involved); *Ginsberg v. New York*, 390 U.S. 629 (1968). *See also Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

For all these reasons, therefore, strict scrutiny is inappropriate in the instant case.

(3)

Pursuant to the 4-prong *Central Hudson* test, local laws such as the one at issue here do not violate the First Amendment, as the First Circuit held in this case and as the Fourth Circuit held in *Penn Advertising*, *supra*, and *Anheuser-Busch*, *supra*.

Here, moving beyond the first and second prongs which are a given, *i.e.*, the advertisements are lawful and the governmental interests are substantial, the third prong of the *Central Hudson* test has also been met because there is substantial evidence that tobacco advertising has been effective in increasing demand among children. In brief, there was substantial evidence before the State of Massachusetts, as there was before the New York and Baltimore City Councils, that there is a proliferation of tobacco product advertising in areas around schools, playgrounds, and other places where children gather, and significant evidence of tobacco manufacturers' targeting of youth in advertising strategies.

Advertising works. Courts have long recognized this self-evident conclusion. In *Central Hudson*, this Court noted: "There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the

advertising ban unless it believed that promotion would increase sales." *44 Liquormart*, 517 U.S at 500 (quoting same). *See Edge Broadcasting*, 509 U.S. at 434 (noting the restrictive legislation at issue was based upon a premise that "advertising ... serves to increase the demand for the advertised product"); *see also Packer*, 285 U.S. at 110 (stressing that outdoor tobacco product advertising, particularly when aimed at "young people," cannot be turned off); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (drawing distinction between a recipient of mailings, (who can toss them out without opening them, and a pedestrian confronted by large billboards, which obviously cannot be turned off).

The laws at issue here pertain to uniquely pervasive media, outdoor billboard and publicly-visible signs, and do not bar tobacco product advertising, but rather merely seek to restrict advertisements to locations where children are less likely to see them.

Accordingly, this case is unlike *Sable Communications of California v. FCC*, 492 U.S. 115 (1989), where a "dial-a-porn" service successfully challenged a regulation imposing a blanket ban on indecent telephone messages, with this Court finding that there were more narrowly-tailored ways to restrict the ability of children to hear such messages. However, this Court carefully distinguished and reaffirmed its holding in *FCC v. Pacifica Foundation*, *supra*, because the restriction did not involve a total ban and the medium was "uniquely pervasive." *Id.* at 127-28.

So too, this case is unlike *Reno v. ACLU*, 521 U.S. 844 (1997), where a majority of this Court found that, unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the Act at issue was not limited to commercial speech or commercial entities, but rather, its open-ended prohibitions embraced all non-profit entities and individuals posting

indecent messages or displaying them on their own computers in the presence of minors. *Id.* at 877. Similarly, *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), concerned a blanket ban on certain expressive speech, which is unlike the instant case.

The fourth prong of the *Central Hudson* test, which requires a determination that the restriction is no more extensive than necessary to serve the governmental interest, was also met. In *Board of Trustees v. Fox*, this Court held that the test is something short of a "least-restrictive-means standard" and that what is required is a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, leaving to governmental decisionmakers the judgment what manner of regulation may best be employed. *Id.*, 492 U.S. at 480. *See Edge Broadcasting*, 509 U.S. at 429-30.

On the record in Massachusetts, as before the N.Y. City Council and the Baltimore City Council, the evidence demonstrated that, although increased enforcement was helpful in decreasing illegal sales of tobacco products, it did not solve the problem. There was ample evidence to support the findings that tobacco advertising is pervasive in areas where children congregate and that such advertising has a detrimental effect on children, influencing them to smoke and thus to acquire tobacco products despite the ban on sales of such products to them. As the First Circuit held and other Circuits have recognized, failure to exhaust all alternative means of enforcing laws against underage sales does not prohibit the imposition of tobacco advertising restrictions. As was the case with New York City and Baltimore, Massachusetts did not "[choose] speech restrictions as its first or only punch in its fight against underage tobacco use." *Consolidated*, 218 F.3d at 51.

Finally, contrary to petitioners' claims, such laws do not limit the ability of adults to read or see any

communication. They simply limit the exposure of young people in publicly accessible forums, which they and their parents cannot control.

Indeed, the number of tobacco advertisements displayed inside the premises of a business which sells tobacco products is not limited, nor is the content of such advertisements. Instead, the Massachusetts and New York City laws simply restrict the location of such advertisements within the stores. The placement of billboards is not banned, but rather restricted to locations where children are less likely to gather.

In addition to the fact that there are significant areas available away from targeted locations where children gather, there are a host of other fora available for tobacco advertising, which are not barred or restricted. In New York City, for example, it can be displayed on all moving vehicles, such as in and on taxicabs, trucks, and delivery bicycles, as well as in magazines, newspapers, and the Internet. *See, Consolidated Cigar*, 218 F.3d at 51-52; *Penn Advertising of Baltimore, Inc. v. Mayor*, 862 F. Supp. 1402, 1414 (D. Md. 1994), *aff'd*, 63 F.3d at 1324; Correia, E.O., *State and Local Regulation of Cigarette Advertising*, 23 Notre Dame Jour. of Legislation 1, 7 (1997).

Accordingly, for all the above reasons, we respectfully urge this Court to affirm the judgment below, recognizing that, in this instance, the historic exercise of state and local police powers, was proper.

CONCLUSION

FOR ALL THE ABOVE REASONS, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

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FOR ARGUMENT

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In The

Supreme Court of the United States

Lorillard Tobacco Co., et al.,
Petitioners,

v.

Thomas F. Reilly, Attorney General of Massachusetts,
Respondent.

Altadis U.S.A., Inc., et al.,
Petitioners,

v.

Thomas F. Reilly, Attorney General of Massachusetts,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF AMICI

It is of utmost importance to the States that they be able to regulate the location of tobacco advertising in order to curb the illegal use of tobacco by minors. Numerous States and local jurisdictions have enacted laws and regulations which restrict where tobacco advertising may be displayed. For example, California prohibits outdoor billboards within 1000 feet of schools or public playgrounds. Cal. Bus. & Prof. Code § 22961 (2001). Utah has banned virtually all outdoor advertising of tobacco products for 80 years. Utah Code Ann. § 76-10-102 (2000). Texas bans tobacco advertising within 1000 feet of both churches and schools, Tex. Health & Safety Code § 161.122 (2000), while Kentucky bans tobacco billboards larger than 50 square feet within 500 feet of schools, Ky. Rev. Stat. Ann. § 438.047 (2000). Arizona prohibits advertisements on school buses for any substance that is "illegal for minors such as alcohol, tobacco, and drugs or gambling." Ariz. Rev. Stat. § 15-342.27(a) (2000).

Additionally, amici States' strong interest in imposing location-based restrictions on tobacco advertising is evident in the non-economic provisions of the Master Settlement Agreement (MSA) entered into in November 1998 by the major tobacco companies and nearly all the States and Territories.[1] *See, e.g.*, MSA § III(c), prohibiting tobacco brand sponsorships of sporting events and concerts where youth are likely to be present; § III(d), banning billboards and most other outdoor advertising of tobacco products; § III(e), prohibiting tobacco companies from paying for the use or display of tobacco products in motion pictures, television shows, theater productions, live music, commercial film or video, and video games; § III(f), prohibiting ads for tobacco products on apparel

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[1] The MSA is available at http://www.naag.org/tobaccopublic.

and merchandise; and § III(g), prohibiting distribution of tobacco product samples except in adult-only facilities.

SUMMARY OF ARGUMENT

Petitioners maintain that the Federal Cigarette Labeling and Advertising Act of 1969, 15 U.S.C. §§ 1331-1340 ("FCLAA"), preempts Massachusetts' regulations restricting the location of tobacco advertisements in proximity to schools and playgrounds. They are wrong. The FCLAA narrowly preempts state regulation of tobacco advertising only if it interferes with the uniform federal health warnings on cigarette packages and in advertisements. *See Cipollone v. Liggett*, 505 U.S. 504, 516 (1991). Congress has expressed no "clear and manifest purpose" to preempt restrictions on the location, as contrasted with the content or message, of tobacco advertising. *Id.* The subject of the Massachusetts regulations falls within the traditional police powers of the States to enact zoning restrictions which further the purpose of enforcing longstanding laws that criminalize the sale of tobacco to minors, thereby protecting children from the consequences of their own immaturity. Simply put, the Massachusetts regulations are not preempted because they are not restrictions "with respect to the advertising or promotion" of appropriately labeled cigarettes "based on smoking and health" within the meaning of Section 5 of the FCLAA, 15 U.S.C. § 1334. Specifying where tobacco products may not be advertised does not interfere with the purpose of the FCLAA to establish uniformity in a health warning system for packaging and advertising of cigarettes.

Petitioners also contend the Massachusetts regulations violate their First Amendment right to freedom of speech. The tobacco advertisements at issue are a species of unadorned commercial speech. The constitutional validity of the Commonwealth's regulation of these advertisements is therefore subject to analysis under the "intermediate" scrutiny standard for commercial speech

articulated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Massachusetts' limited regulations meet that standard: they stem illegal sales activity and further the state's substantial interest in curbing underage tobacco usage, and they do so by means reasonably adapted to that end.

Petitioners have invited the Court to depart from the *Central Hudson* analysis and instead to subject Massachusetts' regulations to the heightened, indeed withering, standard of strict scrutiny – the standard applied to regulation of the most cherished forms of political, philosophical, artistic, and scientific speech. Petitioners appear interested in exploiting the discomfort that some members of the Court have expressed in situations where government has restricted the dissemination to *adults* of truthful, nonmisleading speech involving *lawful* activity in an attempt to keep adults ignorant of facts that might influence their choices in the marketplace. This case, however, presents none of those concerns. Massachusetts' regulations reduce *children's* exposure to the advertising of tobacco products, in a State where the sale of these products has been *illegal* for more than a century. In such a context, *Central Hudson* continues to provide a viable framework for the analysis of restrictions on commercial speech.

Adopting Petitioners' position would severely impede the States' traditional police powers and would hamper efforts to prevent the illegal use of tobacco "particularly among children and adolescents, [which] poses the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

ARGUMENT

I.

MASSACHUSETTS' REGULATIONS ARE NOT PREEMPTED BY THE FCLAA

Massachusetts regulates the location of tobacco advertising in a manner that does not infringe on the federal requirements for advertising and promotion of cigarettes. Because "the Supremacy Clause '[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress,' " *Cipollone*, 505 U.S. at 516 (citation omitted), Massachusetts' regulations are presumptively permitted, not preempted.

In the FCLAA Congress specified that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" labeled in conformity with the Act. 15 U.S.C. § 1334(b) (2000). The scope of the statute's preemptive force rests on an interpretation of two phrases: "with respect to advertising and promotion of cigarettes" and "based on smoking and health." In light of the presumption against the preemption of State police power regulations, both of these phrases must be construed narrowly. *Cipollone*, 505 U.S. at 519 and 523.

A. Massachusetts' Rules Do Not Regulate "With Respect To Advertising Or Promotion Of Cigarettes" Within The Meaning Of The FCLAA

In section 2 of the FCLAA, Congress declared its purpose:

> [T]o establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby –

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (2000).

Thus, Congress reserved the health content of cigarette labeling and advertising for federal regulation in order to avoid the confusion and effect on commerce that would result from differing warning notices and health messages on cigarette packages or advertisements. A State may restrict the location of tobacco advertising without interfering with this congressional design.

Applying established principles of construction, the Second, Fourth, and Seventh Circuit Courts of Appeals – in addition to the First Circuit below – have concluded that location restrictions on tobacco advertising are not pre-empted by § 1334(b). *See Greater New York Metro. Food Council, Inc. v. Giuliani* ("*Giuliani*"), 195 F.3d 100 (2d Cir. 1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago* ("*FAIR*"), 189 F.3d 633 (7th Cir. 1999); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996), *remanded and readopted*, 101 F.3d 332 (1996), *cert. denied*, 520 U.S. 1204 (1997).

Both *Giuliani* and *FAIR* note that the legislative history of 15 U.S.C. § 1334(b) characterizes the preemption section as "narrowly phrased" and expressly intended to preserve the remainder of the States' traditional police powers. *Giuliani*, 195 F.3d at 110; *FAIR*, 189 F.3d at 638.

These two decisions also note that over 30 years before the FCLAA was adopted, the Court held, in *Packer Corp. v. Utah*, 285 U.S. 105, 108-110 (1932), that a statewide ban on tobacco display advertising, including billboards, was a matter of traditional local control and within the State's police powers. 195 F.3d at 109; 189 F.3d at 639. *Giuliani* observed that location restrictions do not lead to the type of "diverse, nonuniform, and confusing" advertising standards Congress sought to avoid, especially in light of the fact that "[d]ivergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them." 195 F.3d at 109. *See also* 189 F.3d at 639; *Penn Advertising*, 63 F.3d at 1324.

The only contrary holding among the circuit courts of appeals on the question of FCLAA preemption of state restrictions on the location of tobacco advertising is *Lindsey v. Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999). But *Lindsey* followed neither *Cipollone's* mandate to give Section 1334(b) a "fair but narrow reading," 505 U.S. at 524, nor *Medtronic's* principle that interpretation of a federal preemption statute "does not occur in a contextual vacuum." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). *Lindsey* read the *Cipollone* plurality opinion as "expressly recogniz[ing] that the plain language of the FCLAA is determinative to resolving preemption issues regarding tobacco advertising." *Lindsey*, 195 F.3d at 1071. Although the court in *Lindsey* "recognize[d] that there is some ambiguity in the FCLAA's legislative history," it discounted this legislative history because "the structure and history of the FCLAA do not unambiguously support" narrow preemption. *Id.* at 1073. The Court has made clear that appropriate weight must be given to the interpretive rules designed to protect state and local regulatory authority from

mistakenly broad preemption that Congress did not intend. These rules, rooted in concerns of federalism, are designed to avoid turning generalities into unintended and invasive displacement of a state's police powers. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (cautioning against constructions that would "read the presumption against preemption out of the law whenever Congress speaks to the matter with generality").

Several courts have recognized the absurd results of applying the kind of broad preemption urged by Petitioners. In *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057 (1994), Reynolds argued that if cigarettes were labeled in conformity with federal law, California could not impose regulations with respect to advertising if the regulations were based on underlying health concerns. This would necessarily include any requirement or prohibition with respect to advertisements of cigarettes that target minors:

> Reynolds contends, in effect, that if it had used billboards depicting Old Joe Camel stating in huge block letters, 'Kids, be the first in your fourth grade class cool enough to smoke Camels'; or, to use the example of the Court of Appeal, 'if Reynolds had . . . presented Teenage Mutant Ninja Turtles on children's lunch boxes to promote cigarette smoking,' California could do nothing about it, for any attempt to do so would be a requirement or prohibition 'based on smoking and health.' Only the federal government, Reynolds claims, can prevent advertisements that urge minors to smoke, no matter how blatantly.

Id. at 1067. Similarly, in *FAIR* the court of appeals observed that a broad reading of the preemptive scope of the FCLAA could lead to results Congress never could have intended, such as the conclusion that "states [are]

without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." 189 F.3d at 638.

Proper application of the principles in *Cipollone* and subsequent decisions of the Court demonstrates that the FCLAA does not preempt the States' exercise of their historic police powers to regulate the location of advertising. Congress's evident, and limited, purpose was to spare the tobacco companies from having to change the content of their health warnings from one jurisdiction to another. Certainly it cannot be said that superseding the States' traditional police powers, such as the power to adopt zoning ordinances and measures to safeguard children, was the "clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516.

B. Massachusetts' Regulations Are Not "Based On Smoking And Health" Within The Meaning Of The FCLAA

Even if Massachusetts were regulating "with respect to advertising or promotion of cigarettes" – which it is not – its regulations would be preempted only if they were also "based on smoking and health." 15 U.S.C. § 1334(b). Although the precise meaning of this phrase is not self-evident, the FCLAA as a whole, and the Act's legislative history, make clear that Congress intended to give it narrow effect as well. As the Court has previously recognized, under the FCLAA,

> pre-emption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health*. It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*. S. Rep. No. 91-566, p. 12 (1969).

Cipollone, 505 U.S. at 529 n.26 (plurality opinion) (emphasis in original). "This indicates that Congress intended the phrase 'relating to smoking and health' . . . to be construed narrowly." *Id.* at 529.

In *Cipollone*, a smoker who had contracted lung cancer asserted state common law claims that the defendants had caused her illness by misrepresenting and concealing the health consequences of smoking. *Id.* at 518. Under a broad reading of the FCLAA, the claims would have been preempted, since the fraud claims purported to regulate the health-related content of cigarette advertising. But the Court found the claims averted preemption because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation – the duty not to deceive." *Id.* at 528-29. *Cipollone* thereby established the limited preemptive reach of the FCLLA's "based on smoking and health" provision.

The statute's language underscores its confined scope. So much attention has been focused on the words "smoking" and "health" that an equally, or perhaps more, significant word in the phrase is rarely thoughtfully considered. To be subject to preemption, a regulation must be "based" on smoking and health. "Base" is defined as "that on which something rests or stands"; "the fundamental part of something"; the "basis." Webster's Third New Int'l Dictionary (1976). It is, therefore, the *purpose* of the regulation that should be examined rather than any potential ancillary "health" advantage that may be obtained by the restriction. Certainly no legislator could be unaware of the health risks attendant to the use of cigarettes and other tobacco products, but the fact that health benefits accrue from advertising restrictions should not skew the analysis of the purpose of the enactment.

It is evident that States and local jurisdictions may choose to act to further their system of laws and to safeguard their minor citizens. Governments have long endeavored to shield minors from the consequences of their own immature judgment and from those who would seek to exploit it. That policy far predates concern about the scientific relationship between smoking and health. Moreover, it supports legislation across a wide spectrum of issues, ranging from age of consent to alcohol to driving requirements. Undoubtedly, many of these laws have public health consequences, but no one would suggest that the statutes are "based on" public health concerns. Their focus, instead, is child welfare and is rooted in the realm of public "morals."

As the California Supreme Court explained in examining the FCLAA's effect,

> [a]lthough the Legislature has certainly spoken about the dangers of smoking, we do not rely on those provisions in finding no preemption, but on Penal Code section 308, which prohibits the sale of cigarettes to minors. The original version of that statute . . . was enacted over a century ago. This was long before current health concerns, and specifically the health concerns that fuel this lawsuit, arose. The statute is part of a chapter of the Penal Code containing offenses "against good morals." Several of these offenses involve minors. (Pen. Code, § 307 [illegal to sell food items containing alcohol to those under the age of 21 years], 309 [illegal to admit a minor to a house of prostitution], 310 [illegal for a minor to attend a prizefight or cockfight].) This shows that the state's protective role, and not primarily health concerns, motivated the prohibition against selling cigarettes to minors.

Mangini, 7 Cal.4th at 1069 (citations omitted). Like California, Massachusetts has sought to prevent underage use of tobacco for more than a century. *See* Mass. Gen. Laws, ch. 270, § 6 (2000).

The Commonwealth's stated basis for its restrictions on tobacco advertising is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." 940 Code Mass. Reg. § 21.01 (2001). Many other jurisdictions have enacted restrictions on the advertising of tobacco products "based" on factors other than "smoking and health." For instance, California's legislation, prohibiting outdoor billboards within 1000 feet of schools or public playgrounds, was expressly designed "as a means to curb the illegal use of tobacco by minors." Cal. Bus. & Prof. Code § 22961; Cal. Stats., ch. 219, § 1(f) (1997). Utah adopted its virtually total ban on outdoor advertising of tobacco products in 1921, Utah Code Ann. § 76-10-102, which this Court squarely upheld in *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Texas's statute bars tobacco advertising within 1000 feet of both churches and schools, a restriction manifestly based on "moral" considerations rather than concerns about the health of churchgoers and school children. Tex. Health & Safety Code § 161.122. Arizona's ban on the advertising of tobacco products on school buses prohibits advertisements for any substance that is "illegal for minors such as alcohol, tobacco, and drugs or gambling" and requires that all advertisements comply with the "state sex education policy of abstinence." Ariz. Rev. Stat. § 15-342.27(a). Like other States, Arizona has grouped tobacco use with a range of activities from which governments typically seek

to shield children, not all of which have a direct negative impact on health.[2]

State and local regulation which does not interfere with the aim of Congress in the FCLAA to promote uniformity in health warnings on packages and in advertisements is not preempted by the Act. As in the case of fraud claims examined in *Cipollone*, there is no evidence that Congress viewed the regulatory scheme of the FCLAA as being aimed at the problem of underage smoking.[3] Given the judicially recognized inability of minors to analyze and appreciate the content of warning labels, *see Anheuser-Busch v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), construing the FCLAA narrowly, so as not to preempt regulations such as those adopted by Massachusetts, is appropriate.

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[2] Not all "health" concerns are related directly to the consequences of the use of tobacco itself. Baltimore's tobacco advertising ordinance, for example, seeks to protect minors from addiction to "harder" drugs. The City Council noted that "cigarettes constitute a 'gateway drug' for Maryland students, as they are often the first drug used by adolescents and 'appear to "open the door" for use of other harder drugs at a later date.' " *Penn Advertising*, 63 F.3d at 1321. Although the Council's concern ultimately relates to health, it is surely not the health issues associated with smoking referred to by Congress in the FCLAA.

[3] Justice Blackmun's opinion in *Cipollone* contains a valuable observation: the FCLAA is unlike other federal statutes where Congress has "eased the bite of pre-emption" by establishing a "comprehensive civil enforcement scheme." *Cipollone*, 505 U.S. at 541-42 (Blackmun, J., concurring in part and dissenting in part). Surely, Congress did not intend to take away a State's ability to protect its youth without providing an alternate framework.

Congress used the phrase "based on smoking and health" for a reason. The phrase means nothing if no matter what government says is its rationale, any law directed toward regulating tobacco advertising is assumed to be based on health considerations and pre-empted. On the contrary, it is reasonable to presume that jurisdictions are exercising their traditional police powers to protect minors when advertising restrictions single out areas frequented by children. Reading the FCLAA as treating all government regulation of advertising and promotion of cigarettes as nonetheless, "based on smoking and health" disregards the genuine and compelling moral objective of state and local lawmakers to protect children from the consequences of their own immaturity.

II.

MASSACHUSETTS' REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT

A. The Regulations Withstand Scrutiny Under *Central Hudson*

The *Central Hudson* inquiry provides a comprehensive means of evaluating the restrictions at issue. The regulations survive that analysis for at least two distinct reasons. First, commercial speech "at least must concern lawful activity and not be misleading" to come under the aegis of the First Amendment. *Central Hudson*, 447 U.S. at 566. But these regulations concern, indeed explicitly target, an *unlawful* activity: the sale of tobacco to minors. They therefore fall beyond the First Amendment's scope. Second, even if the transactions advertised here are deemed lawful for purposes of *Central Hudson*'s threshold inquiry, the regulations still comply with the remainder of the *Central Hudson* analysis. They serve a "substantial" governmental interest. They "directly advanc[e]" that

interest. And they are "not more extensive than is necessary to serve that interest." *Id.* (quoted in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 183 (1999)).

1. The Restrictions May Be Upheld As Targeting Speech That Proposes An Illegal Transaction

The government may restrict, or ban entirely, "speech proposing an illegal transaction." *Village of Hoffman Estates v. Flipside* ("*Flipside*"), 455 U.S. 489, 496 (1982); *see Pittsburgh Press Co. v. Pittsburgh Comm'n On Human Relations*, 413 U.S. 376 (1973). No constitutional objection may be raised to the suppression of commercial messages that inform the public about opportunities to engage in unlawful activity.

Massachusetts, like every other State in the Union, outlaws tobacco sales to minors. *See* Donald W. Garner & Richard J. Whitney, *Protecting Children From Joe Camel and His Friends*, 46 Emory L.J. 479, 498 n.103 (1997). With respect to children, tobacco billboards and in-store advertisements in Massachusetts therefore propose an illegal transaction. Accordingly, such advertising may be restricted. *See Central Hudson*, 447 U.S. at 566 n.9 (speech "related to unlawful activity" may be prohibited); *Mangini*, 7 Cal.4th at 1069 ("Advertising aimed at such unlawful conduct [i.e., tobacco sales to minors] would assist vendors in violating the law").

That the advertisements at issue also promote lawful sales to adults does not change the analysis. The Court has held that speech regarding different types of transactions, only some of which were illegal, should be considered "speech proposing an illegal transaction." *See Flipside*, 455 U.S. at 496. The *Flipside* opinion examined an ordinance that regulated, *inter alia*, commercial speech

regarding "items that have some lawful as well as unlawful uses." *Id.* at 497 n.9. The Court determined that, because "the ordinance [was] expressly directed at commercial activity promoting or encouraging illegal drug use," any commercial speech involved was related to an unlawful activity, and could therefore be "regulate[d] or ban[ned] entirely." *Id.* at 496. It was ultimately of no consequence that the ordinance prohibited speech about products that had legal uses in addition to their employment with illicit drugs.

With respect to tobacco advertising, Massachusetts has passed regulations "expressly directed" at the unlawful use of "items that have some lawful as well as unlawful uses." *Flipside* teaches that the regulations should be upheld on the basis of *Central Hudson*'s first prong.

The Court need not, however, decide that the regulations require no further First Amendment analysis in order to sustain them. The restrictions also survive review under the remaining prongs of the *Central Hudson* test. *Cf. United States v. Edge Broadcasting*, 509 U.S. 418, 425 (1993) (declining to address question of applicability of more lenient standard because the statutes at issue were "not unconstitutional under the standards of *Central Hudson*"). The fact that the commercial speech addressed by the regulations is in substantial part speech that relates to an unlawful activity strongly supports a decision upholding the restrictions under the remainder of the *Central Hudson* analysis.

2. Massachusetts' Regulations Effectively Address A Genuine Harm

The Commonwealth's restriction on tobacco advertising "directly and materially advances" its "asserted interest" in reducing children's use of tobacco and so satisfies the third prong of *Central Hudson*. *Greater New Orleans*

Broadcasting, 527 U.S. at 188. That is, "the harms [Massachusetts] recites are real" and the regulations "will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The means chosen to advance the governmental policy goal "need not be perfect, but simply reasonable." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981).

The Court's opinions do not require that a State establish with scientific certainty that its program will succeed. "[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). Yet just such a surfeit of information is present in this case.

Extensive evidence demonstrates that advertising, and particularly tobacco advertising, increases demand for the product advertised among minors. *See, e.g.*, Garner & Whitney, at 532-42 and n.317 (collecting studies); U.S. Department of Health and Human Services, *Reducing Tobacco Use, A Report of the Surgeon General* (2000) (concluding that "regulation of the sale and promotion of tobacco products is needed to protect young people from smoking initiation" and that "the major barrier to more rapid reductions in tobacco use is the effort of the tobacco industry to promote the use of tobacco products").

The Court has never held that the evidence a State proffers in support of a restriction on commercial speech must be uncontested. Rather, if the government has reasonably relied on studies and other evidence tending to establish the efficacy of its chosen course, then it has satisfied the dictates of *Central Hudson*'s third prong. *See Florida Bar*, 515 U.S. at 628. What the government must avoid are "mere speculation and conjecture," *Edenfield*, 507 U.S. at 770, and "unsupported assertions," *Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136, 143 (1995).

As a practical matter, it is only where the government has offered no evidence, or solely evidence that contradicts the regulation's stated purpose, that the Court has found *Central Hudson*'s requirements unmet. *See, e.g., Ibanez*, 512 U.S. at 148 ("We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here"); *Edenfield*, 507 U.S. at 772 (striking regulation where evidence in record "contradicts, rather than strengthens" the proffered purpose). On the other hand, where the State has offered ample evidence, both empirical and anecdotal, the Court has found the third of *Central Hudson*'s criteria satisfied. *See, e.g., Florida Bar*, 515 U.S. at 627 (upholding regulation supported by record "noteworthy for its breadth and detail").

The studies and other evidence referenced in the Massachusetts "Attorney General's Statement of Material Facts" submitted to the District Court (*see* Joint Appendix at 102) belong in the latter category. Indeed, the Attorney General's submissions in this case appear to exceed in their depth and breadth any such factual submissions described in the Court's prior commercial speech cases. If the Court has never sustained a restriction on commercial speech on the basis of "a record so bare" as that in *Ibanez*, it has also never struck down regulations that rest on a record so replete as that now before it.

The ample record provided by Massachusetts underscores another aspect of the regulations that distinguishes them from restrictions the Court has disapproved in the past: there is no serious dispute that Massachusetts' stated interest in preventing youth smoking is in fact the motivating force behind the regulations. The amount of evidence adduced is, of course, one indication of the nexus between the stated and actual purposes of the government's regulation. In cases where the Court has

suspected a lack of correspondence between the Government's proffered interest and its actual interest, the restrictions at issue have been struck down. *See, e.g., Edenfield*, 507 U.S. at 768 ("Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction"); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion) (questioning restrictions that "serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech") (quoting *Central Hudson*, 447 U.S. at 566 n.9); 517 U.S. at 531 (O'Connor, J., concurring in the judgment) (observing that Court has taken a "closer look" because "we declin[e] to accept at face value the proffered justification for the State's regulation").

Most frequently in these cases, the Court has determined that the government's unspoken motivation was to accomplish economic protectionism through the regulation of speech. *See, e.g.*, Garner & Whitney, at 491 (law in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), "shielded pharmacists from the rigors of free enterprise"). A second such motivation, though it has not always been concealed, has been the forbidden criterion of the "offensiveness" of the speech involved. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977). Neither of these impermissible motivations infects the regulations at issue here.

Accordingly, the regulations satisfy the third test of *Central Hudson*.

3. The Restrictions Provide The Requisite Fit Between The Government's Means And Ends

Government regulations must, in order to comport with the First Amendment, represent "a fit that is . . . reasonable" between the State's ends and the means it has selected to achieve them. *Board of Trustees v. Fox* ("*Fox*"), 492 U.S. 469, 480 (1989). In order that "the Legislative and Executive Branches" may be accorded "needed leeway," *id.* at 481, the particular regulation need not represent the "single best disposition," *id.* at 480, or the "least restrictive means" of limiting the commercial speech at issue, *id.* at 480, 481. Rather, the scope of the regulations must be "in proportion to the interest served."[4] *Id.* at 480.

In the particular context of commercial speech, the Court has established that the government has greater

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[4] Accordingly, Massachusetts need not criminalize the purchase of tobacco by minors, or require licenses of retailers who sell tobacco, or adopt any other single measure that Petitioners may point to as extant in another State. *See* Pet. Br. at 25 n.4. A State is not required to exhaust every possible non-speech remedy before employing a limited speech-based restriction. If the reverse were true, a State would have no way to know when it had done enough. Would it be sufficient to exact fines from underage tobacco users, or would the Commonwealth need to legislate prison terms as well before it could begin to address the advertising that stoked the minors' demand? *Cf. Fox*, 492 U.S. at 481 (noting "the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires"). It is crucial to view Massachusetts' regulations *in context*, as part of a longstanding, extensive effort to prevent underage tobacco use, of which recently enacted restrictions on commercial speech are but a part. The regulations are "narrowly tailored to achieve the desired objective." *Id.* at 480. They need not be more: "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

freedom to regulate when it does so with respect to consumers who – like children – are particularly vulnerable to such speech. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978) (focusing concern on "unsophisticated, injured, or distressed" consumers and granting State greater leeway to protect those "more vulnerable to influence"). The level of "sophistication of [the advertiser's] audience," and the "undue influence" that may be brought to bear on the unsophisticated, have remained foci of the Court's concern. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 366, 384 n.37 (1977). Recently, for example, the Court has allowed restriction of attorneys' commercial speech in the solicitation of vulnerable clients "only days after accidents," *see Florida Bar*, 515 U.S. at 631, but barred such restriction of an accountant's direct approach to "sophisticated and experienced business executives," *see Edenfield*, 507 U.S. at 775. With respect to the pervasive enticements of present-day advertising, children can be considered *per se* a vulnerable population. That status is heightened in the case of tobacco advertising, where the consequences of children's being influenced by the companies' marketing are so severe – initiating a dangerous, highly addictive behavior – that the permissible "scope" of regulation "in proportion to the interest served" must necessarily be enhanced. *See Fox*, 492 U.S. at 480.

In evaluating the reasonableness of the "fit" in this case, the Court's decision in *United States v. Edge Broadcasting* ("*Edge*"), 509 U.S. 418 (1993), is particularly instructive. The Court there upheld a ban on North Carolina broadcasters' advertising of a Virginia lottery because the ban supported North Carolina's policy prohibiting in-state lotteries. *Id.* at 428, 434. The advertising ban was permissible even though the actual lottery advertised was "a legal activity," *id.* at 426, both as to

Virginians and as to North Carolinians who might cross the border to participate. *See Bigelow v. Virginia*, 421 U.S. 809, 822-24 (1975). Here, by contrast, the particular transaction advertised – the sale of tobacco products – is *illegal* as to at least a significant part of the audience receiving the speech. The fundamental government "objective" here is significantly greater than the purpose the Court found sufficient in *Edge*.

Furthermore, the "cost" imposed by the advertising ban in *Edge* was notably larger, and the benefit appreciably smaller, than in the present case. *See Fox*, 492 U.S. at 480. In *Edge*, the fact that the vast majority of the potential audience for the broadcast – more than 92% – lived in Virginia and were therefore not the intended "beneficiaries" of the government's speech regulation did not change the outcome, because the regulation did benefit the in-state portion of the audience (approximately 8%) which it was intended to benefit. 509 U.S. at 429. Here, the population Massachusetts aims to protect is, in percentage terms, likely more than three times as great.[5]

In addition, although these children may encounter tobacco ads in other places and in other media such as newspapers or magazines, the fact that they will be freed from exposure for at least part of the time represents a cognizable benefit. In *Edge*, the restrictions "exclud[ed] invitations to gamble from 11% of the radio listening time" of the North Carolina residents who could be

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[5] Approximately 22.5% of the Massachusetts population is under age 18. *See Age Distribution: Massachusetts Cities and Towns*, 1990 Census of Population and Housing, Report #91-9 (6/12/91), *available at* http://www.umass.edu/miser/dataop/data.htm. Minors may be presumed to be present in at least somewhat greater concentrations in the particular areas targeted by the regulations, i.e., in the vicinity of schools and playgrounds.

reached by the Edge station's broadcasts. *Id.* at 432. That benefit was explicitly held to provide more than "ineffective," "remote," "conditional," or "limited incremental support" to the government's purpose and, therefore, to pass muster under *Central Hudson*. *Id.* A plurality of Justices additionally considered the cumulative impact of the advertising restriction statewide; however, Justice Souter, joined by Justice Kennedy, briefly concurred to note that "the restriction at issue here [was] constitutional" even as applied to the Edge station alone. *Id.* at 436 (Souter, J., concurring). Massachusetts' restrictions on tobacco advertising, which are similarly partial, confer at least as great a benefit. *Cf. id.* at 434 ("Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes").

The regulations at issue may readily be distinguished from the type of commercial speech restrictions that the Court has invalidated. For example, the Court has voided regulations restricting speech about constitutionally protected commercial activity. *See, e.g., Carey*, 431 U.S. at 700-01 (contraception); *Bigelow*, 421 U.S. at 822-23, 827-28 (abortion services). But in no case has the Court invalidated restrictions on commercial speech that – like those here – were enacted in furtherance of, and actually advanced the purpose of, a prohibition on commercial activity that could legitimately be banned.[6] *See, e.g., Fipside*, 455 U.S. at 496.

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[6] The requirement that the underlying commercial activity be unlawful avoids the 44 *Liquormart* plurality's expressed concern that a lesser standard – for example, a condition that the activity merely be designated a "vice" – would open the floodgates to suppression of protected speech. 517 U.S. at 514. Indeed, the "illegality" requirement comports precisely with the

The Court has also disapproved of situations in which an ambivalent government is left to defend the irrational remains of an ill-conceived or half-abandoned scheme. *See Greater New Orleans Broadcasting*, 527 U.S. at 190 ("regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *44 Liquormart*, 517 U.S. at 503 n.13 and 506 (any connection between speech restriction and asserted goal would be "purely fortuitous"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (noting "overall irrationality of the Government's regulatory scheme"). In *Greater New Orleans Broadcasting*, the federal government's "ban" on advertising of casino gambling was so riddled with exceptions and contradictions that the regulatory scheme was "decidedly equivocal." 527 U.S. at 187. The underlying "illegal" activity – gambling – was, in effect, no longer unlawful. Here, by contrast, Massachusetts' plan for preventing underage smoking is thorough and unequivocal; the State's policies have been uniformly aimed at preventing youth smoking, not promoting it. Finally, this is not a case in which the government has acted only on a "recently developed concern." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Tobacco sales to minors have been illegal in Massachusetts since 1886. *See* Mass. Gen. Laws, ch. 270, § 6 (2000).

Massachusetts has adopted restrictions that address permissible objects of regulation and does so rationally and consistently. The Commonwealth has outlawed tobacco sales to minors, an action of undisputed constitutionality. *See Austin v. Tennessee*, 179 U.S. 343 (1900). The

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plurality's proposed test to prevent such abuse. *See id.* ("a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity").

restriction of tobacco advertising is part of an overall program – indeed, part of a national program, including the FCLAA – dedicated to the same purpose as the outlawing of tobacco sales: the reduction of underage tobacco use. The Commonwealth has attempted numerous less speech-restrictive options, but was not and is not required to find the "least restrictive means" to accomplish its goal. *See Fox*, 492 U.S. at 481. The government's unequivocal message, part of a coherent and extensive regulatory scheme, is quite clear: underage tobacco use should be prevented. *See Packer*, 285 U.S. at 108-09 (Brandeis, J.) (upholding ban on billboard tobacco advertising as valid part of State's effort to "prevent the use of tobacco by minors").

Several additional factors support a determination that the regulations satisfy the fourth of *Central Hudson*'s requirements. First, with respect to the specific types of media at issue here, the Court has emphasized that "[e]ach method of communicating ideas is a law unto itself." *Metromedia*, 453 U.S. at 501 (billboards). The regulations therefore must be separately assessed as to each advertising medium: billboards, in-store advertisements, and self-service displays. If any of the restrictions at issue does not pass First Amendment muster, it may be severed from the remainder. *See* 940 Code Mass. Reg. § 21.06.

Second, Massachusetts' choice of a 1,000-foot radius in which to enforce its advertising restrictions permissibly applies not only to outdoor advertising, *see FDA v. Brown & Williamson*, 529 U.S. at 128, but also to advertisements within retail establishments selling tobacco products. This radius, and the area it encompasses, have received the Court's explicit approval in other First Amendment contexts. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986) (approving use of 1,000-foot radius from, inter alia, schools and parks to bar adult

theaters from almost 95% of land area of town); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) (government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

Finally, the continued availability of a wide variety of alternative media for tobacco promotion undermines the tobacco companies' assertion that the regulations constitute a "total ban" on their commercial speech. Petitioners' argument that the regulations at issue unduly limit the advertising options available to small retailers, *see* Pet. Br. at 38, is unavailing. Petitioners are tobacco manufacturers, not retailers. They may not, in the context of a commercial speech case, make this sort of "overbreadth" argument. *See Flipside*, 455 U.S. at 497 ("the overbreadth doctrine does not apply to commercial speech"); *Fox*, 492 U.S. at 481 (same).

In the particular circumstances at issue, the fit between the regulations' ends and their means is a reasonable one. The restrictions therefore satisfy *Central Hudson*'s final prong.

B. Heightened Scrutiny Is Inappropriate In The Present Case

Petitioners argue that the Court should seize this case as an opportunity to apply a more stringent standard than that of *Central Hudson* to regulation of commercial speech. This argument ignores the context of the present case. Massachusetts' regulations seek to address problems unique to children, a particularly vulnerable class for whom the consequences of decisions they are ill-equipped to make can have lifelong repercussions. The regulations at issue were promulgated in furtherance of a State's laws outlawing tobacco sales to minors. In these particular circumstances, a State is entitled to greater, not

lesser, leeway to craft laws that restrict purely commercial speech.

Governmental restrictions on the constitutional rights of children are accorded "lesser scrutiny" than similar constraints on adults. *Carey*, 431 U.S. at 694 n.17. As a result, "the scope of permissible state regulation is broader as to minors than as to adults." *Id.* This regime rests on an uncontroversial assumption: "the law has generally regarded minors as having a lesser capability for making important decisions." *Id.* at 693 n.15 (citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part)).

Petitioners' call for heightened scrutiny of Massachusetts' tobacco regulations rests primarily on the concerns expressed by a number of Justices regarding the propriety of excepting certain types of commercial speech from enhanced review. But whatever the scope of these concerns, they certainly do not include the commercial speech at issue here. In *44 Liquormart*, a plurality of the Court observed that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 517 U.S. at 503; *see also id.* at 524 (Thomas, J., concurring). The *44 Liquormart* plurality also criticized "the offensive assumption that the public will respond 'irrationally' to the truth." *Id.* at 503. To seize on these statements as the basis for application of strict scrutiny for regulations aimed at protecting *children* makes no sense at all.

The problems associated with keeping rational, adult consumers ignorant of their choices in the marketplace have no bearing on the regulation of commercial speech addressed to children. *See Anheuser-Busch*, 101 F.3d at 329 (noting "the Supreme Court's repeated recognition that

children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media"). The same is true of concerns for maintaining a "fair bargaining process." *44 Liquormart*, 517 U.S. at 501. *See* Pet. Br. at 35. Children are, indeed, so removed from the world of commercial transactions that they lack even the capacity to enter into contracts: "Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain." *Planned Parenthood of Central Missouri*, 428 U.S. at 102 (Stevens, J.). It is precisely children's lack of capacity for foresight that motivates Massachusetts' attempt to intervene in its minor citizens' decisions regarding the use of tobacco products, decisions which carry with them lifelong consequences.[7]

Petitioners' curious reliance on the Court's statements regarding "paternalism" emphasizes the divergence of this case from the opinions expressing interest in heightened scrutiny for commercial speech with respect to adults. *See, e.g., 44 Liquormart*, 517 U.S. at 497 ("a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it"). A state may adopt protective measures to safeguard children that might be decried as unwarranted paternalism if applied only to adults. *See* Garner & Whitney, at 561 ("Paternalism in the service of children is a virtue, not a vice"). Indeed, Justice Scalia anticipated this difficulty with Petitioners' argument, noting that he shared the "aversion towards paternalistic governmental policies

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[7] The Court's only prior commercial speech cases dealing with asserted governmental interests in protecting children addressed the marketing of contraceptives, products about which *lack* of information might have such consequences. *See Bolger*, 463 U.S. at 60; *Carey*, 431 U.S. at 678.

that prevent *men and women* from hearing facts that might not be good for them." *44 Liquormart, 517 U.S.* at *517* (Scalia, J., concurring in part and concurring in the judgment) (emphasis added). The circumstance is far different, however, when children are exposed to a variety of commercial blandishments the accuracy of which they may be unable to discern. Children simply do not have the same capacity as adults for analyzing and weighing commercial messages. The government may therefore act to safeguard children, particularly when the product involved in the advertising has such a demonstrable potential for harm that its sale to children has been criminalized. This is all the more true with respect to media – like those at issue here – in which the commercial message is delivered outside the home, where parental influence and control are more attenuated.

Strict scrutiny is, therefore, peculiarly inappropriate in this particular case. There exist, moreover, serious concerns regarding the consequences of such stringent review for commercial speech in general. Basing constitutional doctrine on the real-life distinctions between commercial and noncommercial speech has permitted the Court to recognize protection for the former without debasing the core protection afforded the latter. *See Fox*, 492 U.S. at 481 ("To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech"). The Court's jurisprudence reflects, for example, that a false or misleading statement may be tolerated in the exposition of political or religious belief but is unacceptable in commercial advertising. *Compare Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) *with Central Hudson*, 447 U.S. at 563. Likewise, no one can be compelled to speak another's political or religious

message, yet labeling and advertising disclosures may be required to protect and inform the public.[8] *Compare Pacific Gas and Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) ("the choice to speak includes within it the choice of what not to say") and *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), *with 44 Liquormart*, 517 U.S. at 501 (contemplating mandatory disclosures of any "beneficial consumer information") and *In re R.M.J.*, 455 U.S. 191, 201 (1982). The application of strict scrutiny standards to commercial speech would result in challenges to reasonable governmental economic regulatory efforts to safeguard the public. Since many economic regulations have a speech-limiting or speech-compelling component, the application of strict scrutiny to assay government economic regulations under the guise of free speech analysis could be little different in effect from reviving the long-discredited strict scrutiny "liberty of contract" and substantive due process challenges leveled at economic regulation during the heyday of *Lochner v. New York*, 198 U.S. 45 (1905).[9] In any event, the question whether strict scrutiny should ever apply to commercial speech restrictions

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[8] *See Rubin*, 514 U.S. at 492 n.1 (Stevens, J., concurring in the judgment) (citing 21 U.S.C. § 343 (requiring contents and nutritional value of packaged foods be revealed on the label); 21 U.S.C. § 352 (setting disclosure requirements for drug labels); and 15 U.S.C. § 77e (mandating registration statement be filed before selling securities)).

[9] A tobacco industry challenge to the same federal cigarette labeling law on which Petitioners predicate their preemption case can easily be envisioned: tobacco companies have chronically denied that tobacco usage causes lung cancer and emphysema but are compelled to carry contrary warning labels that might be impermissible under a strict scrutiny standard. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (government could not compel citizens to "use their private property as a 'mobile billboard' for the State's ideological message").

need not be resolved here. The *present* case is simply not one in which heightened scrutiny is appropriate.

CONCLUSION

Amici States urge the Court to affirm the judgment of the Court of Appeals. The regulations at issue constitute a legitimate exercise of the State's traditional police powers to prevent illegal tobacco use by children. They are neither preempted by the FCLAA nor barred by the First Amendment.

Respectfully submitted,

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Nos. 00-596, 00-597

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IN THE

Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, Attorney General
of Massachusetts, *Respondent.*

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, Attorney General
of Massachusetts, *Respondent.*

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Massachusetts regulations that sharply limit the public display of cigarette advertisements do *not* impose prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts's prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980).

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in Massachusetts.[1] WLF regularly appears before federal and state courts promoting economic liberty, free enterprise, and a limited and accountable government.

WLF devotes a substantial portion of its resources to protecting the right of commercial free speech, appearing before this Court in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed,* 202 F.3d 331 (D.C. Cir. 2000). WLF filed *amicus curiae* briefs in this case in support of the certiorari petition and in the court of appeals.

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* ("FCLAA"). That policy strongly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

WLF is filing this brief with the consent of all parties. Letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the brief of Petitioners Lorillard Tobacco Co., *et al.* In brief, Petitioners challenge regulations (the "Regulations") promulgated by the State of Massachusetts in January 1999 that virtually eliminate the ability of manufacturers, distributors, and retailers of tobacco products to provide truthful brand and pricing information to lawful adult consumers of tobacco products by means of "outdoor" advertising. *See* 940 CMR §§ 21.00 *et seq.*, 22.00 *et seq.*[2]

The Regulations prohibit maintaining any tobacco advertisement within 1,000 feet of any school, park, or playground. 940 CMR §§ 21.04(5)(a), 22.06(5)(a). The prohibited zone covers between 87% and 91% of the land area in the cities of Boston, Worcester, and Springfield. Petition Appendix in No. 00-596 ("Pet. App.") 79a. The district court determined that the zone "effectively bans nearly all outdoor advertising, and captures nearly all retail establishments in those cities." *Id.* The Regulations apply to *all* outdoor tobacco advertising, without regard to the truthfulness of the advertisement or whether it actually misleads any consumers. The Regulations also impose strict limits on retail sales practices of those selling tobacco products. 940 CMR §§ 21.04(1) and (2), 22.06(1) and (2).

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[2] The definition of "outdoor" advertising includes advertising inside a store that is visible from the outside.

The Regulations also require that specified health warnings be prominently displayed on all cigar advertisements and package labeling. 940 CMR §§ 22.04 and 22.05.

Petitioners filed suit in May 1999 in U.S. District Court for the District of Massachusetts, challenging the Regulations on three principal grounds. First, Petitioners in No. 00-596 (manufacturers of cigarettes and smokeless tobacco) argued that the Regulations were preempted by the FCLAA, which imposes strict limits on state regulation of cigarette advertising. Second, all Petitioners argued that the Regulations violated the First Amendment right to engage in truthful commercial speech. Third, Petitioners in No. 00-597 (cigar manufacturers) alleged that the Regulations violated the Commerce Clause because the health warning requirements imposed an undue burden on interstate commerce.

On December 2, 1999, the district court held that the Regulations were in large measure *not* preempted by the FCLAA. Pet App. 46a-60a. The court held that the Regulations focused principally on the *location* of tobacco advertisements, and that the FCLAA's preemption provision applies only to state and local laws that seek to regulate the *content* of such ads. *Id.* at 55a-56a. While conceding that the preemption provision of the FCLAA could be interpreted as applying to the Regulations if one's analysis focused on the FCLAA's language (*id.* at 53a), the court rejected that interpretation because it would "leav[e] states essentially powerless" to exercise their "inherent police powers to regulate smoking" -- powers that (the court believed) Congress intended to protect. *Id.* at 54a-55a.

The district court also upheld provisions in the Regulations that outlaw (in the absence of age verification) certain tobacco product promotional techniques, including sampling, promotional give-aways, and offering gifts to tobacco purchasers. The court held that those provisions were not preempted by the FCLAA because they addressed the illegality of underage smoking, not the relationship between smoking and health. *Id.* at 58a-59a.[3]

On January 24, 2000, the district court rejected Petitioners' First Amendment challenge to the Regulations, granting summary judgment to Massachusetts. Pet. App. 61a-104a. Initially, the court rejected Petitioners' argument that the Regulations should be subject to a heightened standard of review, higher than the standard of review for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980). *Id.* at 65a-68a. The court held that the Regulations survived the *Central Hudson* test because they directly advanced a substantial government interest (reducing youth smoking) in a manner no more extensive than necessary. *Id.* at 68a-87a. The court held that Massachusetts's evidence was sufficient to establish as a matter of law that "it was reasonable" for the

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[3] The court held that the FCLAA did preempt a provision of the Regulations that permitted "tombstone advertising" -- small signs placed outside retail establishments stating "Tobacco Products Sold Here." 940 CMR § 21.04(6). Pet. App. 57a. The court went on to hold that § 21.04(6) was severable from the remainder of the Regulations and thus that the remaining provisions were fully enforceable. *Id.* The effect of this ruling was to render the Regulations more restrictive of commercial speech than as originally promulgated. Massachusetts did not appeal from this aspect of the district court's ruling.

Attorney General to conclude that the goal of reducing youth smoking "would be advanced in some material respect" by restricting tobacco advertising. *Id.* at 74a. The court also held as a matter of law that virtually all of the restrictions on advertising were sufficiently narrowly tailored to pass constitutional muster "[i]n light of the marginal success" of all the state's non-speech-related efforts to control youth smoking. *Id.* at 78a.[4]

The district court also held that the cigar health warning requirements did not violate the First Amendment. *Id.* at 89a-93a. Recognizing that the warning requirements, if broadly construed, might present Commerce Clause difficulties, the court construed the requirements as not applying to Internet advertising and advertising in national magazines, and as permitting warning labels to be affixed at any time prior to retail sale. *Id.* at 100a-103a. As so construed, the court rejected the Commerce Clause challenge. *Id.* at 93a-103a.

On July 17, 2000, the First Circuit affirmed in substantial part. Pet. App. 1a-45a. With respect to FCLAA preemption, the appeals court said that the Regulations involved legislation in a field "traditionally occupied" by the States and thus that it would invoke a strong "presumption against preemption." *Id.* at 7a-9a. In interpreting the FCLAA language it viewed as key -- the preemption of State

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[4] The court struck down one provision on First Amendment grounds: 940 CMR § 21.04(5)(b), which prohibited indoor, point-of-sale tobacco advertising less than five feet from the floor. The court held that Massachusetts failed to demonstrate that this provision was not more extensive than necessary to serve the state's interest in reducing youth smoking. *Id.* at 82a.

laws "with respect to the advertising or promotion of any cigarettes" (15 U.S.C. § 1334(b)) -- the Court said that the language should not be given a "hyper-literal reading," because otherwise the FCLAA would preempt a broad range of State regulation "which Congress surely did not intend to affect." *Id.* at 10a.

Rather, the court deduced the meaning of § 1334(b) by turning to the FCLAA's statement of purpose, 15 U.S.C. § 1331. The court noted two purposes listed in § 1331: (1) to inform the public of the health risks associated with smoking; and (2) to protect the national economy from the burdens that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards. *Id.* The court determined that the Regulations offended neither of those purposes and thus were not preempted. It held that the Regulations were merely "location" restrictions, not an effort to regulate the content of any tobacco advertising. *Id.* at 12a-13a. It held that to the extent that the Regulations contributed to the nonuniformity of tobacco advertising restrictions nationwide, "such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country." *Id.* at 13a.

With respect to the First Amendment claims, the First Circuit rejected Petitioners' argument that -- in light of the near-total prohibition on truthful tobacco advertising based solely on its content[5] -- heightened review (*i.e.*, review beyond that required by *Central Hudson*) was in order. *Id.*

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[5] The appeals court rejected out of hand Massachusetts's suggestion that the Regulations did not amount to content-based speech restriction. *Id.* at 14a.

at 14a-16a. The court cited *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), for the proposition that heightened review is inappropriate even when regulations single out the promotional speech of a particular industry. *Id.* at 15a. The court acknowledged "rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification"; but it felt "bound to apply the *Central Hudson* test, as is, to this case," because it was not the court's role "to anticipate changes in well-established constitutional doctrines." *Id.* at 16a.

The court then determined that the Regulations passed muster under the *Central Hudson* test. Pet. App. 17a-35a. Because the court was reviewing the grant of summary judgment for Massachusetts, it assumed that the speech at issue was truthful, nonmisleading speech about a lawful activity. The court determined that Massachusetts had a substantial interest in preventing children from smoking (*id.* at 18a), that the Regulations "directly advance" that interest by reducing underage smoking to a material degree (*id.* at 19a-29a), and that the Regulations do not restrict more speech than is necessary to achieve the State's purpose. *Id.* at 29a-35a.[6]

The appeals court also rejected the cigar manufacturers' First Amendment challenge to the cigar health warning

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[6] The court reversed the district court's sole First Amendment ruling in support of Petitioners -- the district court's decision to strike down the prohibition against indoor, point-of-sale tobacco advertising less than five feet from the floor. *See* Note 4, *supra*. In upholding the prohibition, the appeals court stated that its earlier *Central Hudson* analysis was equally applicable and that "the fit between ends and means" was "very reasonable." *Id.* at 35a-37a.

requirements, "for substantially the reasons set forth in the lower court's opinion." *Id.* at 38a-40a. However, the court agreed in large measure with the cigar manufacturers' Commerce Clause claims. *Id.* at 40a-44a. The court held that the health warning required on advertising unduly burdened interstate commerce because the practical effect of the requirement was to compel manufacturers to include the Massachusetts warnings in all national advertising. *Id.* at 40a-43a. The court held that the warning required on package labeling also unduly burdened interstate commerce because manufacturers would be required to include Massachusetts labels on all their products -- no matter where sold -- in order to avoid the liability that would be imposed if a cigar lacking the required labeling were imported into Massachusetts by a third party. *Id.* at 43a-44a.

Massachusetts did not cross-petition on the Commerce Clause findings. Accordingly, the case is before the Court solely on the First Amendment and FCLAA issues.

SUMMARY OF ARGUMENT

The First Circuit's decision that the Regulations are not preempted by federal law is inconsistent with the better-reasoned decisions that have addressed the preemptive effect of the FCLAA. *See, e.g., Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir. 1999). In preempting any state or local "requirement or prohibition based on smoking and health . . . with respect to [cigarette] advertising or promotion" (15 U.S.C. § 1334(b)), Congress was concerned with the impact of state and local regulations on "commerce and the national economy." 15 U.S.C. § 1331. Section 1334(b) bars *all* positive enactments of state

or local bodies that specifically target cigarette advertising for adverse treatment. To allow each of the 50 states and each of the thousands of municipalities throughout the country to decide where, in what media, and under what conditions cigarette advertising may be allowed -- each in the name of serving some assertedly nonpreempted purpose -- would make a mockery of the policy of national uniformity embodied in the FCLAA, and would defeat the "comprehensive Federal program" that policy serves.

Quite apart from the preemption issue, the Regulations are also deficient under established case law governing restrictions on commercial speech. Moreover, that case law is in need of substantial modification. WLF respectfully suggests that the Court modify the *Central Hudson* test, to clarify that blanket bans on truthful, nonmisleading commercial speech are subject to strict First Amendment scrutiny. Such strict scrutiny would be applied whenever, as here, the purposes underlying the more-relaxed standard of review often applied to commercial speech (principally, a desire to preserve a fair bargaining process by ensuring that consumers are not misled by inflated sales pitches, *44 Liquormart,* 517 U.S. at 501 (plurality opinion)) are not implicated by the regulation in question.

ARGUMENT

I. THE REGULATIONS IMPOSE A "PROHIBITION" THAT IS "WITH RESPECT TO THE ADVERTISING OR PROMOTION" OF CIGARETTES, AND THEY THUS ARE PREEMPTED

A. By Its Plain Language, the FCLAA Preempts State Regulation of Cigarette Advertising

In the FCLAA, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring every cigarette package (and, later, by requiring every cigarette advertisement) to carry health warnings specified by Congress itself. At the same time, Congress also sought to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving the cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. 15 U.S.C. § 1331.[7]

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[7] Section 1331, which declares the policy and purpose of the FCLAA, provides in its current form:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--
>
> > (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
> >
> > (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

(continued...)

To give effect to this policy of national uniformity -- protecting cigarette advertising while providing for the dissemination of government warnings about smoking -- the FCLAA contains an explicit preemption provision that provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). This provision "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 91-566, at 1 (1969). Congress thus sought to protect "commerce and the national economy" from "the chaos created by a multiplicity of conflicting regulations." *Id.* at 12.

A majority of the Justices in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and the Ninth Circuit in *Lindsey*, recognized that the language of § 1334(b) is expansive. Thus, even giving that language a "narrow" reading (505 U.S. at 518), the *Cipollone* plurality emphasized that the key phrase "'[n]o requirement or prohibition' sweeps broadly." *Id.* at 521; *see also id.* at 551 (Scalia, J., concurring in the judgment in part and dissenting in part). The Ninth Circuit in *Lindsey* likewise emphasized the expansiveness of § 1334(b), and the court noted that *Cipollone* had rejected giving that provision a more

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[7](...continued)
15 U.S.C. § 1331.

restrictive meaning than the "plain meaning" of the words actually used. *Lindsey*, 195 F.3d at 1071-73 (citing *Cipollone*, 505 U.S. at 522 (plurality); and *id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part)).

The First Circuit appeared to recognize § 1334(b)'s broadly worded nature, but it nonetheless declined to follow the Ninth Circuit's lead in assigning the words of § 1334(b) their natural meaning. Rather, the First Circuit accused the *Lindsey* court of "fail[ing] to avoid the 'uncritical literalism' that the Supreme Court has cautioned us against." Pet. App. 13a n.7 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 656 (1995)). It explicitly disagreed with the Ninth Circuit's conclusion that "'[t]here is no good reason to believe that Congress meant less than what it said,' *Lindsey*, 195 F.3d at 1073, in the phrase 'with respect to advertising.'" Pet. App. 13a n.7. The appeals court referred to the "ambiguity" of § 1334(b)'s phrase "with respect to" advertising and promotion, and asserted:

> [A] "hyper-literal" reading of that phrase would preempt a range of state regulation which Congress surely did not intend to affect. [*Greater New York Metropolitan Food Council v. Giuliani*, 195 F.3d 100, 105 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1671 (2000).] For example, "it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or, . . . it could lead to the conclusion that states [are] without

> power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." *Id.*

Pet. App. 10a.

Accordingly, the First Circuit simply refused to base its decision on an analysis of § 1334(b)'s language. Rather, it focused on the FCLAA's statement of purpose at 15 U.S.C. § 1331. It held that the Regulations did not conflict with Congress's purpose (which, according to the court, consisted of a desire to prevent conflicting regulations regarding the "information" contained in cigarette advertising, *id.*) and thus that the Regulations are not "with respect to" advertising and are not preempted. *Id.* at 10a-13a.[8]

This Court has never endorsed such a counter-textual method of statutory interpretation. "Pre-emption fundamentally is a question of congressional intent." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). That intent is to be derived, wherever possible, by examining the words actually chosen by Congress, not (as did the First Circuit) by

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[8] The First Circuit did not directly address whether the Regulations constituted a prohibition "based on smoking and health." The court's very abbreviated discussion of that issue suggests that the Court believed that the Regulations *were* "based on smoking and health," because the court said that it "d[id] not adopt" the Fourth Circuit's contrary conclusion in *Penn Advertising, Inc. v. Mayor and City Council,* 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded,* 518 U.S. 1030 (1996), *adopted as modified,* 101 F.3d 332 (4th Cir. 1996), *cert. denied,* 520 U.S. 1204 (1997). Pet. App. 13a n.6. Because § 1334(b)'s "based on smoking and health" language played no part in the First Circuit's decision upholding the regulations, the meaning of that phrase is not now before the Court. Accordingly, this brief does not address the meaning of that phrase.

rejecting the most natural reading of the statutory language simply because one cannot believe that Congress would have intended all of the consequences that would flow from adopting a natural reading. *Hughes Aircraft Co. v. Jacobson,* 119 S. Ct. 755, 760 (1999); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486 (1996) ("Congress's intent, of course, is discerned from the language of the pre-emption statute and the statutory framework surrounding it.") (citation omitted).

Any faithful reading of § 1334(b)'s language requires a conclusion that the Regulations are preempted. Section 1334(b) bars any state or local "prohibition" "with respect to the advertising or promotion" of cigarettes. There can be no serious dispute that the Regulations impose a "prohibition." Nor can Massachusetts seriously assert that the Regulations are not "with respect to the advertising or promotion" of cigarettes, as those words are commonly understood; indeed, 940 CMR 21.04(5) is entitled, "Advertising Restrictions."

The First Circuit admitted as much but nonetheless held that § 1334(b) was intended to bar only *some* prohibitions "with respect to the advertising or promotion" of cigarettes: those that sought to regulate the *content* of cigarette advertising but not those that sought to regulate the *location* of such advertising. Pet. App. 10a-11a. Nothing in the language of § 1334(b) supports such a distinction between prohibitions based on "content" and on "location" -- even conceding for the sake of argument that the Regulations can accurately be categorized as "location"- based. Nor does § 1331 (the FCLAA's statement of purpose) support the distinction that the First Circuit attempted to draw. The appeals court is correct that Congress in § 1331 made clear its desire to protect "commerce and the national economy"

by prohibiting "nonuniform and confusing cigarette labeling and advertising regulations," but that language does not support the court's conclusion. If large numbers of localities began imposing bans on outdoor cigarette advertising, the diversity, nonuniformity, and confusion in the field of cigarette advertising regulation would be just as great as if large numbers of localities began mandating specific content in cigarette advertising. In both instances, nationwide product promotional campaigns would have to be varied from city to city (and from section to section within cities) to meet the vagaries of local law. Section 1331(2) addresses the problems of nonuniformity created by diverse "advertising regulations," not merely those created by diverse "warning" requirements.

Moreover, there is no merit to the First Circuit's assertion that interpreting the words of § 1334(b) in accord with their plain meaning would lead to an array of untenable results that Congress could not have intended. For example, the court asserted that Congress could not possibly have intended to "divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there." Pet. App. 10a. But § 1334(b) quite plainly does *not* prevent states and municipalities from prohibiting tobacco advertising in public buildings; § 1334(b) bars them from doing so only if the prohibition is "based on smoking and health." A municipal ban on *all* advertisements in a public building that is not a public forum would not be "based on smoking and health" and thus would not be preempted. A ban that targeted only tobacco advertisements would, of course, be prohibited, but there is no reason to believe that Congress

did not mean to prohibit such content-based speech restrictions.[9]

The appeals court also worried that a "hyper-literal" reading of § 1334(b) would lead to the conclusion that Congress intended to deny States the power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard. *Id.* Such concerns are wholly fanciful. Nothing in the language of § 1334(b) suggests that Congress intended to interfere with State regulation of the manner in which cigarettes are distributed; indeed, States are free to ban the sale and distribution of tobacco products altogether. None of the courts that have invoked § 1334(b) to strike down cigarette advertising bans has suggested that the prohibition on sale or distribution to minors (currently in place in all 50 States) is preempted. What States may *not* do under § 1334(b) is to burden truthful cigarette advertising by imposing a requirement or prohibition "based on smoking and health."

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[9] The appeals court's language suggests that the First Circuit believed that an advertising ban directed only at tobacco advertisements was rendered wholly unobjectionable if the ban applied only in buildings in which smoking was illegal. That suggestion makes no sense. There undoubtedly are many buildings in Massachusetts in which smoking is prohibited, but the sale and use of tobacco products remains a legal activity within the State. Unless Massachusetts is prepared to argue that a cigarette advertisement in a smoke-free office building is highly likely to induce those within the building to defy the smoking ban, there is nothing incongruous about insisting that tobacco advertising be placed on an equal footing with other advertising within a smoke-free building.

In sum, the plain language of § 1334(b) leaves little doubt that Congress intended to prevent States and municipalities from enacting the sort of tobacco advertising ban at issue in this case. By operation of the Supremacy Clause, the Regulations are invalid.

B. In Choosing to Ignore the Plain Meaning of § 1334(b), the First Circuit Adopted Invalid Statutory Construction Rules

To justify its decision to stray from the plain meaning of § 1334(b), the First Circuit cited repeatedly to the presumption against preemption. *See, e.g.*, Pet. App. 12a ("We therefore must read the language of the FCLAA . . . in light of the manifest congressional concern in preserving for the states the remainder of their traditional police power.") (quoting *Federation of Advertising Industry Representatives, Inc.* [*"FAIR"*] *v. City of Chicago,* 189 F.3d 633 (7th Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000)).

But this Court has never viewed the presumption against preemption as anything other than one statutory tool among many, to be used in attempting to discern congressional intent. Where (as here) congressional intent can be discerned from the plain meaning of the statutory language, courts are not warranted in resorting to a presumption against preemption as a justification for departing from that plain meaning. *Hughes Aircraft,* 119 S. Ct. at 755. By invoking a presumption against preemption as the decisive factor in finding that the Regulations are not preempted, the First Circuit abandoned the search for Congress's purpose, substituting instead a bias in favor of preserving state law regardless of congressional intent.

Invocation of a presumption against preemption is particularly inappropriate on this record. As the Court explained just this week, a presumption against federal preemption of State regulation may be warranted when the regulation takes place in "'a field which the States have traditionally occupied.'" *Buckman Co. v. Plaintiffs' Legal Committee,* No. 98-1768 (U.S. Sup. Ct., Feb. 21, 2001), slip op. at 5. But Massachusetts does not contend that it has ever previously attempted to impose special restrictions on tobacco advertising, or to impose restrictions on *any* outdoor advertising based on the subject matter. Indeed, local restrictions on tobacco advertising were not attempted outside Utah until very recently. Because there were virtually no state-law tobacco advertising restrictions in place when the FCLAA was adopted in 1969, there is no reason to presume that Congress intended that its law not displace such restrictions. *See also, United States v. Locke,* 120 S. Ct. 1135, 1147 (2000).

Nor can the First Circuit's rejection of § 1334(b)'s plain meaning be justified by the court's citation to *Travelers*.[10]

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[10] The First Circuit did not simply ignore the actual language of the FCLAA; it appeared to conclude that since the plain meaning of the statute led to what the court viewed as unpalatable results, the statutory language *should be* ignored. The court could not claim support for this dubious approach in *Cipollone*, which had said quite the opposite. It turned instead to *Travelers*, a Supreme Court ERISA case in which the Court deemed it necessary to "go beyond the unhelpful text" of ERISA's extraordinarily expansive preemption provision, by "look[ing] instead to the objectives of the ERISA statute as a guide." *Travelers*, 514 U.S. at 655-56. A fair reading of *Travelers* -- read on its own or (more appropriately) with the far more apposite holding in *Cipollone* in mind -- does not begin to support the

(continued...)

The court cited *Travelers* for the proposition that federal preemption statutes should not be read with "uncritical literalism" lest the result would be "to read the presumption of preemption out of the law." Pet. App. 11a-12a (quoting *FAIR*, 189 F.3d at 637). When understood in its context as an ERISA preemption case, *Travelers* provides no support for the First Circuit's analysis.

At the outset, the language of ERISA lends little support for *any* interpretation of the FCLAA. The language of ERISA's preemption statute (which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]")[11] is far more vague and open-ended than the language of § 1334(b). It is for this reason that the Court has described ERISA's text as "unhelpful" while concluding that the "plain meaning" of the FCLAA should serve as the guide to its meaning. *Compare Travelers*, 514 U.S. at 656 (ERISA text discussed) with *Cipollone*, 505 U.S. at 517 (FCLAA text described).

The First Circuit's selective reading of ERISA case law is, in any event, fundamentally misguided. Even if, as the appeals court suggested, a few words of the limiting language of the FCLAA at issue here ("with respect to advertising and promotion") are similar in breadth to ERISA's preemption provision ("relate to any employee benefit plan"), ERISA case law itself leads to the conclusion that the Regulations should have been held entirely preempted.

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[10](...continued)
First Circuit's analysis.

[11] 29 U.S.C. § 1144(a).

Specifically, the First Circuit's selective quotation of *Travelers* fails to inform the reader that this Court has construed ERISA's "relate to" language as yielding two alternative approaches, only one of which was at issue in *Travelers*. As the Court subsequently noted in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), "[a] law relates to a covered employee benefit plan for purposes of [ERISA] preemption if it (1) has a connection with *or (2) reference to such a plan.*" *Id.* at 324 (internal quotations omitted) (emphasis added). The Court made clear in that case that its decision in *Travelers* -- which relied upon "'the objectives of the ERISA statute'" so as to avoid an "uncritical literalism" -- addressed only the first-prong "connection with" approach. *Dillingham,* 519 U.S. at 325 (citation omitted).

The approach not addressed in *Travelers* -- namely, the "reference to" approach -- is that which heeds the assumption, recognized in *Cipollone* and other decisions of this Court, that "the ordinary meaning" of a preemption provision "accurately expresses the legislative purpose" of Congress. *See Cipollone,* 505 U.S. at 532 (Blackmun, J., concurring in part and dissenting in part) (citation omitted); *see also id.* at 521-22 (plurality opinion) (citation omitted); *id.* at 545 (Scalia, J., concurring in part and dissenting in part). According to this approach, a state law "refers to" an ERISA plan (and is therefore preempted) if it "acts immediately and exclusively upon ERISA plans" or "the existence of ERISA plans is essential to the law's operation." *See Dillingham*, 519 U.S. at 325.

That is precisely the case here. That the Regulations make *reference to* cigarette advertising or promotion is obvious. That is what they are all about. As the First Circuit itself acknowledged, the Regulations are intended to "restrict the sale, promotion, and labeling of tobacco products." Pet. App. 4a. Thus, even under the operative test for ERISA preemption set forth in *Dillingham,* the Regulations clearly "refer to" cigarette advertising and therefore "relate to" it as well.

Finally, the First Circuit's ruling that § 1334 permits States to regulate the advertising or promotion of cigarettes based on smoking and health concerns under the guise of "zoning regulations" so long as those restrictions do not affect the content of federally mandated health warnings (Pet. App. 12a-13a), is simply untenable. There is no "zoning regulations" exception to § 1334(b)'s preemption provision. State and local zoning regulations that are "based on smoking and health" *and* imposed "with respect to the advertising or promotion of cigarettes" are -- like the Regulations -- expressly preempted by the FCLAA.

II. THE REGULATIONS VIOLATE THE FIRST AMENDMENT BY IMPERMISSIBLY RESTRICTING NONMISLEADING COMMERCIAL SPEECH

A. The *Central Hudson* Test Provides Insufficient Protection to Commercial Speech and Should Be Abandoned

The FCLAA does not purport to preempt State and municipal regulation of cigar advertising and promotion. Accordingly, the Court will need to address the First

Amendment issues raised by this case regardless whether the Court's FCLAA's analysis obviates the need to address the First Amendment claims raised by the cigarette and smokeless tobacco manufacturers in No. 00-596.

WLF concurs with Petitioners that the Regulations violate the First Amendment even if they are examined under the standard of review set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). WLF is writing separately on this issue to encourage the Court to abandon the current *Central Hudson* test once and for all. The Court has been moving in that direction for the past decade in its commercial speech decisions. Because it involves restrictions on wholly truthful speech -- a category of speech for which extremely few restrictions are warranted, regardless whether the speech is commercial or noncommercial -- this case provides a particularly appropriate occasion to provide *Central Hudson* with the overhaul it desperately requires.

The short-comings of the *Central Hudson* test could not be more starkly illustrated than they are in this case. Applying that test in an apparently good-faith manner, the First Circuit upheld a virtually total ban on outdoor tobacco advertising in the Commonwealth of Massachusetts. The ban was upheld even though: (1) the speech at issue was wholly truthful and non-misleading and concerned a lawful product; (2) there was no evidence that the speech was directed at minors; (3) the court of appeals conceded that the ban was content-based -- the *only* type of speech prohibited is speech that promotes the use or sale of tobacco products; (4) the evidence was equivocal at best regarding whether the Regulations would reduce underage smoking to a material

degree; and (5) other methods that do not involve restricting speech could be used to achieve the State's purpose.

Any First Amendment test that could even arguably be applied to uphold sweeping speech restrictions of the type at issue in this case has little to recommend itself. The Court has repeatedly recognized that commercial speech -- while standing somewhat lower in the First Amendment pantheon than does political speech -- is still entitled to substantial constitutional protection. But the *Central Hudson* test as applied here provides virtually no First Amendment protection; as construed by the First Circuit, *Central Hudson* has become an elastic concept that requires judicial deference to virtually any government commercial speech restriction imposed under the banner of children's welfare.

The importance of advertising in our free-market economy cannot easily be overstated. As the Court has recognized, commercial messages have played "a central role in public life" in this country since colonial times. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 495 (1996) (plurality opinion). In recognition of that role, the courts have held that "the First Amendment protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services." *Id.*

Nonetheless, governments generally have been afforded somewhat more leeway in regulating commercial speech than other forms of speech. That greater leeway has been justified in large part by states' strong interest in protecting consumers from false or misleading information that could result in fraudulent transactions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,

771-772 & n.24 (1976). States also have an interest in restricting "some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart,* 517 U.S. at 498 (plurality) (citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 366 (1977)).

But where, as here, the commercial speech at issue is neither false nor inherently misleading, nor proposes an illegal transaction, the Court has been extremely reluctant to permit speech restrictions that amount to a ban on wide-ranging categories of commercial speech. As the Court recently observed, "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart,* 517 U.S. at 501 (plurality). Such "complete speech bans" are "particularly dangerous" because "they all but foreclose alternative means of disseminating certain information." *Id.* The Court went so far as to state categorically in one recent case that "*only* false, deceptive or misleading commercial speech may be banned." *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation,* 512 U.S. 136, 142 (1994) (emphasis added).

The Regulations do not, of course, *completely* ban all cigarette advertising within Massachusetts. A Boston store wishing to inform the public that it sells a particular brand of cigarettes is still free to post a sign to that effect somewhere in the 9% of the city in which cigarette advertising is permitted, or to take out a newspaper advertisement. But such advertising is not a realistic alternative for many store owners; a sign posted miles from the store is unlikely to be

read by the store's potential customers, and the prohibitive cost of newspaper advertisements places such advertising out of reach of most individual merchants. The Court has stated repeatedly that commercial speech restrictions will be subjected to heightened scrutiny even when they do not completely prohibit dissemination of truthful information about a lawful product, if those restrictions fail to leave open satisfactory alternative channels of communications. *See, e.g., 44 Liquormart,* 517 U.S. at 501-02 (plurality) (Rhode Island law prohibiting truthful advertising of liquor prices subjected to heightened scrutiny, even though merchants permitted to display in-store signs listing prices); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92-94 (1977) (ban on "For Sale" signs in front of residential housing failed to provide satisfactory alternative means of informing the public that a particular house was for sale, because "For Sale" signs were the principal means by which such information was traditionally conveyed).

As the Court has made clear, government bans on commercial speech are anathema to the First Amendment when designed not to guard consumers from false or misleading information, but rather as an indirect means of regulating conduct. Such bans are premised on the assumption that the government knows best what is good for consumers and that they are better off if they are denied access to certain information, even though it is not in any way misleading. The Court has labeled such assumptions "offensive" to First Amendment values:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest

> solely on the offensive assumption that the public will respond "irrationally" to the truth. *Linmark,* 431 U.S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the public perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.

44 Liquormart, 517 U.S. at 503 (plurality); *see also id.* at 517 (Scalia, J., concurring in part); *id.* at 526-27 (Thomas, J., concurring in part); *Virginia State Board of Pharmacy,* 425 U.S. at 762 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented.").

The Regulations could not survive the strict First Amendment review that the Court's recent opinions suggest is required of all laws that impose total or near-total bans on non-misleading commercial speech. The result of the Regulations is to deprive consumers of significant amounts of truthful information. Massachusetts insists, of course, that its purpose is to keep this information away from *minors*, who are prohibited by law from purchasing cigarettes. But the Court has rejected broad commercial speech bans even when their ostensible purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 73-74 (1983).

The First Circuit nonetheless rejected Petitioners' First Amendment challenge to the regulations, invoking the *Central Hudson* test. That result suggests the existence of considerably tension between *Central Hudson* and more recent decisions of the Court. Indeed, that tension was acknowledged in *Greater New Orleans Broadcasting,* 527 U.S. at 184, and by several of the opinions in *44 Liquormart. See, e.g., 44 Liquormart,* 517 U.S. at 526-28 (Thomas, J., concurring in part). WLF respectfully suggests that this case provides an appropriate vehicle for jettisoning the *Central Hudson* test in order to remove that tension.

The essential shortcoming of *Central Hudson* is that it really is no test at all. It permits content-based government regulation of commercial speech where the government has a substantial interest that is directly served by the regulation and where the regulation is no more extensive than necessary to achieve the substantial interest. As applied to speech which the government wishes to keep away from children, *Central Hudson* can be construed (as did the First Circuit) as imposing no constitutional limits whatsoever. Under the First Circuit's view, *any* amount of speech about activities inappropriate for children could induce some amount of that activity among children. Because it is virtually impossible to ensure that *no* children will be exposed to such speech, the effect of the First Circuit's interpretation of *Central Hudson* is to eliminate *all* First Amendment controls over even blanket bans on truthful speech about adult-only activities. Indeed, that is precisely the situation here; despite Massachusetts's insistence that the Regulations are (in some unfathomable way) "carefully tailored" in a manner designed to protect children, the Regulations effectively ban all outdoor advertising of tobacco products.

B. *Central Hudson* Should Only Be Applied in Cases Involving Misleading or Potentially Misleading Commercial Speech

WLF respectfully suggests that the Court modify the *Central Hudson* test, to clarify that blanket bans on truthful, nonmisleading commercial speech are subject to strict First Amendment scrutiny. Such strict scrutiny would be applied whenever, as here, the purposes underlying the more-relaxed standard of review often applied to commercial speech (principally, a desire to preserve a fair bargaining process by ensuring that consumers are not misled by inflated sales pitches, *44 Liquormart,* 517 U.S. at 501 (plurality opinion)) are not implicated by the regulation in question.

WLF does not suggest that all constitutional distinctions between commercial and noncommercial speech be eliminated. But previously articulated bases for those distinctions need to be re-examined. The Court traditionally has justified a somewhat lower degree of constitutional protection for commercial speech by citing two alleged "common sense" differences between commercial and noncommercial speech:

> The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little

> likelihood of its being chilled by proper regulation and foregone entirely.

Virginia State Bd. of. Pharmacy, 425 U.S. at 771 n.24.

WLF respectfully submits that, regardless of what "common sense" once seemed to suggest, these distinctions can no longer, under careful consideration, support sharply different constitutional treatment for commercial and noncommercial speech. The claim that commercial speech is "more durable" than other forms of speech because it is engaged in for a profit has never been borne out by research. Other motivations for speaking can be just as strong as economics, such as religious feeling, political enthusiasm, or artistic impulses. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech,* 76 Va. L. Rev. 627, 637 (1990).[12] Nor does verifiability adequately distinguish between commercial and noncommercial speech. Many varieties of noncommercial speech, such as scientific speech, are at least as objective as commercial speech yet receive full First Amendment protection. *Id.* at 635.

Perhaps the only difference between commercial and noncommercial speech of any real constitutional significance is that commercial speech is far more likely to be relied on by recipients in connection with major life decisions. Because of the relative importance of commercial speech in

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[12] Moreover, economic motivation does not adequately distinguish commercial from noncommercial speech. Much noncommercial speech is engaged in for a profit but nonetheless receives full First Amendment protection, such as newspaper publishing and news broadcasting. *Id.*

the day-to-day lives of listeners, the government has a particular interest in ensuring that commercial speech not be misleading. As the Court has recognized, "The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Virginia State Bd. of Pharmacy,* 425 U.S. at 771-72. Accordingly, the government has a heightened interest in ensuring that commercial speech not be misleading or potentially misleading. That interest is sufficient to justify continuation of the *Central Hudson* test in cases in which the truthfulness of the speech is subject to challenge.[13]

But where, as here, there is no evidence that the prohibited commercial speech at issue would be either misleading or potentially misleading, there is no valid rationale for providing the speech with lesser protection than that afforded to noncommercial speech. Under the strict scrutiny to which restrictions on noncommercial speech are normally subjected, the Regulations cannot stand.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

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[13] If speech is only *potentially* misleading, WLF submits that the governmental interest is insufficient to justify prohibition of the speech if other government controls are sufficient to address the government's concern. For example, disclaimers attached to product label will often be sufficient to eliminate the potential that consumers will be misled. Thus, for example, the health warnings mandated by the FCLAA on cigarette labels and advertisements are generally deemed sufficient to ensure that no consumers who buy cigarettes will be misled (by the absence of the warnings) into believing that the products are safe.

Respectfully submitted,

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(28)

No. 00-596

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, et al.,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL
OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR TOBACCO-FREE KIDS, PUBLIC CITIZEN, INC., AND NINE OTHER PUBLIC HEALTH GROUPS IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

This brief in support of respondent is submitted by the National Center for Tobacco-Free Kids, Public Citizen, Inc., and nine other public health organizations dedicated to tobacco control efforts.[1] Amici are more fully described in the appendix to this brief. Amici share a common interest in supporting the Massachusetts Attorney General's effort to protect children from the tobacco industry's efforts to entice children to experiment with tobacco. Amici file this brief to highlight two points. First, this Court should reject petitioners' preemption argument because there is no indication that Congress, when it addressed the question of tobacco labeling in 1969, intended to eliminate the power of states and local governments to regulate the placement of tobacco advertising. Second, this Court should reject petitioners' invitation to rewrite the law governing commercial speech. Amici's counsel have represented parties seeking to invalidate speech restraints in a number of cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993). Amici believe that the framework developed by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), to judge restraints on commercial speech strikes the appropriate balance between safeguarding the free speech rights of commercial actors and preserving the ability of government to prevent harm to consumers.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution to its preparation and submission. The parties' letters consenting to the filing of this brief are on file with the Clerk of the Court.

BACKGROUND

Although petitioners' brief makes no mention of the public health imperative that lies at the heart of this case, the Massachusetts regulations at issue, 940 C.M.R. §§ 21.00-2707, were promulgated to help Massachusetts enforce its laws forbidding tobacco sales to minors and thereby stem the rising tide of tobacco addiction by minors. The statistics are grim:

* More than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths. 61 Fed. Reg. 44396, 44398 (1996).

* Tobacco alone kills more people each year in the United States than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined. *Id.*

* One out of every three children who become regular smokers will die prematurely from a tobacco-related disease. *Id.* at 44399.

After these facts were published in 1993 and 1994, one might have expected tobacco use among minors to decline. It has not. The number of children and adolescents using tobacco products has increased, despite law in all fifty states banning the sale of tobacco products to anyone under age 18. In 1994, the Surgeon General reported that approximately three million American adolescents smoked cigarettes and an additional one million adolescent males used smokeless tobacco. *Id.* at 44398 (citing HHS, Office on Smoking and Health, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at 5 (GPO 1994) ("1994 Surgeon General Report")). Today, "[a]t least 4.5 million adolescents (aged 12-17 years) in the United States smoke cigarettes." *CDC Fact Sheet* at <www.cdc.gov/tobacco/research_data/youth/initfact.htm> (visited Mar. 1, 2001). Each day, more than 6,000 minors try their first cigarette. CDC, *Incidence of Initiation of Cigarette*

Smoking Among U.S. Teens at <www.cdc.gov/tobacco/research_data/youth/initfact.htm> (visited Mar. 1, 2001). And each day, more than 3,000 minors become daily smokers. *Id.*; *see also* 61 Fed. Reg. 44568 (about one million minors start to smoke each year).

Time and again, studies have shown that tobacco use begins with kids. Children try their first cigarette at an average age of 14½. 61 Fed. Reg. 45239 (citing 1994 Surgeon General's Report at 67). Eighty-two percent of adults who have ever smoked had their first cigarette before age 18. *Id.* More than half of them have already become regular smokers by that age. *Id.* The average age when people become daily smokers is approximately 17½. *Id.*

Despite massive federal and state efforts to combat tobacco use by minors, children continue to smoke and chew tobacco. In the mid-1990s, cigarette smoking increased among high school students nationwide. CDC, *Tobacco Use Among Middle and High School Students—United States, 1999*, 49 Morbidity and Mortality Weekly Report 49 (Jan. 28, 2000) ("MMWR"). As of 1999, nearly 13% of middle school students and nearly 35% of high school students used tobacco products. *Id.* As reported by the Centers for Disease Control, "frequent smoking" rates (defined as smoking on 20 or more of the previous 30 days) for high school students rose from 12.7% in 1991 to 16.8% in 1999 and showed no sign of leveling off. CDC, *Trends in Cigarette Smoking Among High School Students—United States 1991-1999*, 49 MMWR 756-57 (Aug. 25, 2000). In addition, although black high school students had been smoking cigarettes at a lower rate than other racial groups, the lower rate no longer applies to black middle school students, who smoke cigarettes at a rate comparable to that of their peers. 49 MMWR at 49, 51.

In Massachusetts in particular, the smoking rate for high school students increased 14% from 1993 to 1997, reaching its

peak in 1995, although the rate appears to be tapering off. "Frequent" smoking increased 19% from 1993 to 1997. CDC, *Cigarette Smoking Among High School Students—11 States, 1991-1997*, 48 MMWR 686 (Aug. 13, 1999).

Just as tobacco use is prevalent among kids, so too is tobacco addiction. As many as 92% of all cigarette smokers and 75% of all young people who regularly use smokeless tobacco consume those products because they are addicted to nicotine. 61 Fed. Reg. 44635-36. A 1997 study found that, although three-fourths of the high school students who had ever been daily smokers had tried to quit, only 13.5% of those students had been successful (that is, had not smoked in the previous thirty days). CDC, *Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students—United States, 1997*, 47 MMWR 386 (May 22, 1998).

Nicotine's addictiveness is now virtually undisputed. Although for many years the tobacco industry feigned ignorance of the addictive nature of its products, the Food and Drug Administration ("FDA") tobacco rulemaking presented overwhelming evidence that the industry's prior public statements were lies. For example, a Philip Morris report quoted by the FDA cited nicotine as "the primary reason" why people smoke and placed cigarettes in the category of "nicotine delivery devices," along with nicotine patches and nicotine gum. 61 Fed. Reg. 44854, 44866. An R.J. Reynolds memorandum, referring to "the confirmed user of tobacco products," acknowledged that "[h]is choice of product and pattern of usage are primarily determined by his individual nicotine dosage requirements. . . ." *Id.* at 44868. Brown & Williamson and its parent BATCO have referred to nicotine as the reason "why people inhale smoke." *Id.* at 44880. As stated by the Centers for Disease Control, "[a]s with other drug addiction, nicotine dependence is a progressive, chronic, and relapsing disorder."

47 MMWR at 387. To fight this disorder, "[t]he optimal public health strategy is to prevent tobacco use completely or to intervene as early" as possible. *Id.*

Because "[n]early all first use of tobacco occurs before high school graduation . . . if adolescents can be kept tobacco-free, most will never start using tobacco." 1994 Surgeon General Report at 5. In other words, because tobacco use begins in childhood, any effective effort to reduce the incidence of serious and often fatal health effects of using tobacco products must begin with children.

A significant part of the effort to keep adolescents tobacco-free is keeping them from exposure to tobacco advertising. As documented in the FDA's comprehensive examination of tobacco use among young people, advertising plays a material role in the decision of children to use tobacco. 61 Fed. Reg. 44489. Perhaps the most telling statistic is this: 86% of minors who smoke use one of the three most advertised brands, while the most common choice among adult smokers is brandless cigarettes (private label, generics, or plain packaged products). *Id.* at 44482. A 1993 study showed that 60% of adolescent smokers preferred the most heavily advertised brand, Marlboro, but only 23.5% of adult smokers did so; 13.3% of adolescent smokers preferred Camels, the second most advertised brand, in contrast to only 3.9% of adults; and 12.7% of adolescent smokers preferred Newport, the third most advertised brand, as compared to only 4.8% of adults. CDC, *Comparison of Advertising to Brand Preference on Adolescents and Adults, 1993,* available at <www.cdc.gov/tobacco/research_data/ advcoadv/brndtbl.htm> (visited Mar. 1, 2001); *see also* 60 Fed. Reg. 41314, 41333 (1995) (introduction of brands marketed to females associated with sharp increase in smoking rate of girls under 18 but not in rate of women 18 and over).

Another survey reported that 87% of adolescents could recall seeing one or more tobacco advertisements and half could identify the brand associated with one of four slogans. *Id.* at 41332. This finding is significant because children who smoke are more likely than children who do not to identify the brand associated with various cigarette ads and slogans. *Id.* Thus, in another study, high school students who smoked recognized 61.6% of tobacco ads, while non-smokers recognized only 33.2%. *Id.*

Although advertising is not solely responsible for minors' decisions to smoke, research shows that tobacco advertising has both "predisposing and reinforcing effects on youth smoking . . . [that] generally apply after holding constant the established influence of parental, sibling, and friend's smoking." Wakefield, *et al.*, *Changes at the point-of-purchase for selling tobacco following the 1999 tobacco billboard advertising ban* at 11-12 (U. of Ill. at Chic. 2000). Internal industry documents demonstrate that, for many years, the industry has banked on this fact, making a concerted efforts to attract young smokers and "presmokers" through advertising. 61 Fed. Reg. 44480.

For example, focusing on the need to attract adolescents, one cigarette company memorandum discussed strategy for "[a]ds for teenagers." 60 Fed. Reg. 41330. The advertising executive who created the Marlboro cowboy stated: "The Marlboro cowboy dispels the myth that in order to attract young people, you've got to show young people." *Id.* And in 1990, R.J. Reynolds devised a "Young Adult Smokers" program, one aspect of which involved identifying retailers "located across from, adjacent to . . . [and] in the general vicinity of" high schools and college campuses. *Id.*

As a 1976 R.J. Reynolds Research Department memorandum states, "Evidence now available . . . indicate[s] that the 14 to 18 year old group is an increasing segment of the

smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained in the long term." 61 Fed. Reg. 44481. R.J. Reynolds followed through on this advice in 1986 with the Joe Camel advertising campaign. Before then, Camel had less than 3% of the youth market. *Id.* at 45246 (citing 1994 Surgeon General Report at 70). By 1991, a study found that 30% of 3-year-olds and 91% of 6-year-olds could identify Joe Camel as a symbol for smoking. *Id.* at 45246. By 1992, Camel had 13-16% of the youth market. *Id.* During that same time period, adult use of Camel showed no significant increase. *Id.* (citing 1994 Surgeon General Report at 70).

Petitioners portray the Master Settlement Agreement ("MSA") between the states' Attorneys General and the tobacco industry as having resolved the issue of advertising to minors. Petitioners are wrong. "Cigarette marketing to teens through magazine advertising increased after the Master Settlement Agreement took effect in November 1998." Turner-Bowker (Mass. Dept. of Health) & Hamilton, *Cigarette Advertising Expenditures Before and After the Master Settlement Agreement: Preliminary Findings* 1 (May 15, 2000). More specifically, the tobacco industry spent more than one-third of its total magazine advertising expenditures for the first nine months of 1999 on magazines with more than 15% youth readership. *Id.* The industry spent approximately $30 million more on advertising in these magazines in those nine months than it had spent in the same months of 1998. *Id.* Advertising for Marlboro alone increased by $26.1 million in magazines with 15% or more youth readers—a $5.2 million increase over the amount spent the prior year. *Id.* Advertising for Kool in those magazines increased by $4.3 million, or 75.8%. *Id.* at 2. Brown & Williamson showed the largest percentage increase—72.1% percent, and R.J. Reynolds had the biggest dollar increase—$11 million. *Id.* at 3.

After the MSA, the tobacco industry also increased point-of-purchase advertising. According to the Federal Trade Commission, ads posted at retail locations "grew by $38.7 million (13.3%) from 1998 ($290.7 million) to 1999 ($329.4 million)." FTC, *Cigarette Report for 1999* at 4 (issued 2001). Industry spending on retail value added offers (such as "buy three, get free T-shirt," where the cigarette product and the bonus item are packaged together as a single unit) grew by $1 billion (64.6%) from 1998 ($1.56 billion) to 1999 ($2.56 billion). *Id.* at 5. These figures confirm another recent study, which found significant increases in interior store advertising, exterior store advertising, in-store promotions (for example, cents-off promotions), and tobacco-related objects (for example, clocks with brand logo). Wakefield, *supra* at 3. Likewise, in light of the "growing evidence that cigarette advertising and promotions increase youth smoking," the increase in such advertising is of "particular concern from the perspective of those seeking to reduce teenage smoking," *id.* at 11, especially since "three out of four teenagers visit a convenience store at least once per week." *Id.* at 12.

Moreover, although the MSA has affected where the tobacco industry spends it advertising dollars, it has not resulted in a decrease in the total dollars spent. In fact, total tobacco industry advertising has grown from $5.67 billion in 1997, to $6.73 billion in 1998, to $8.23 billion in 1999. *Cigarette Report for 1999* at 16. Industry expenditures for magazine and newspaper advertising continue to rise, as does spending on point of sale advertising, direct mail, and public entertainment (for example, sponsorship of sporting events). *Id.*

Today, no one, not even Philip Morris, disputes that smoking and chewing tobacco products are hazardous and often deadly. No one disputes that people who regularly use tobacco products begin to do so when they are kids. If the Commonwealth of Massachusetts, indeed, if the nation, is to make significant and sustainable inroads against the cancer,

heart disease, lung disease, and deaths caused by tobacco products, it must focus on protecting kids from the advertising that persuades children to use tobacco products in the first place.

SUMMARY OF ARGUMENT

1. The Massachusetts regulations are not preempted by section 5 of the Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334. The Attorney General's brief explains why the tobacco industry's preemption argument—squarely rejected by all but one of the circuit courts to consider it—cannot be reconciled with the text or purpose of the Act. We highlight one point below: The industry's reading of the preemption provision would yield a result that is antithetical to Congress's overall goals in the Act. As petitioners read it, section 5 of the Act sweeps so broadly that it forbids *any* local regulation of *any* sort of tobacco advertising and promotion. There simply is no indication in the text of section 5, the remainder of the Act, or its legislative history, that Congress intended to immunize the tobacco industry from all local regulation of tobacco advertising. Nonetheless, this Court would have to reach precisely that conclusion to uphold industry's across-the-board preemption claim.

2. The Massachusetts regulations survive First Amendment review because they directly serve the substantial—indeed compelling—governmental objective of reducing tobacco consumption by minors and are narrowly crafted to that end. We leave to the Attorney General the straightforward task of explaining why the regulations at issue here pass muster under *Central Hudson*.

Apparently even petitioners recognize the weakness of their *Central Hudson* argument. Their main plea is not that the regulations fail *Central Hudson* review, but that this Court should discard the *Central Hudson* test in cases where the restriction limits the dissemination of truthful, nonmisleading

information for reasons "unrelated to the preservation of a fair bargaining process." Pet. Br. at 28 (citations omitted). In those cases, and petitioners say that this is one, the Court should apply strict scrutiny. We make three points that might not stand out in the Attorney General's more comprehensive treatment of the issues.

First, this Court should reject petitioners' invitation to scrap more than twenty years of consistently-applied precedent that has followed and refined *Central Hudson*. We are not here to praise *Central Hudson*, but we strongly oppose its burial. *Central Hudson* reflects a high degree of sensitivity to First Amendment values, while, at the same time, it recognizes that government often has a legitimate need to regulate the communicative aspects of commercial transactions to protect consumers. *Central Hudson* has worked well over the past two decades because it places a heavy, but not insurmountable, burden on government to demonstrate that its interest in protecting consumers from fraud, deception, or overreaching is substantial and that it has tailored its speech restraints as narrowly as possible. The fact that only a handful of the restraints reviewed by the Court have been upheld belies petitioners' suggestion that *Central Hudson* does not adequately protect First Amendment values. Petitioners may fret over *Central Hudson*'s approach, but they have no warrant to complain about its results.

Second, petitioners are wrong to claim that the Massachusetts regulations were imposed for reasons unrelated to the preservation of a "fair bargaining process." The regulations are, in fact, designed precisely for that purpose. There is nothing "fair" about petitioners deliberately marketing tobacco products to children. What is striking about petitioners' brief is how little attention it pays to the overwhelming public health imperative that led Massachusetts to act. The tobacco industry ignores both its sordid history of marketing its products directly to our nation's youth and its success in enticing 6,000

children each day to try cigarettes for the first time. Wishful thinking cannot change history. Having thrown down the gauntlet by attempting to end run Massachusetts' law forbidding the sale of tobacco products to minors, industry may not now be heard to complain that Massachusetts has picked up that gauntlet by protecting the Commonwealth's children from the industry's advertising assault.

Finally, whatever concerns the Court may have about *Central Hudson*, this case is a singularly inappropriate vehicle for the Court to consider its modification. Contrary to petitioners' protestations that Massachusetts has imposed a near-total ban, this case is about line-drawing and nothing more. No broad-scale restraint on petitioners' expressive activities has been imposed; petitioners remain free to communicate to adults through newspaper, magazine, telephone, and direct mail marketing. And the industry concedes that the First Amendment does not forbid Massachusetts from barring billboard advertising across the street from elementary schools. Thus, the question here is whether Massachusetts has gone too far to protect its children from the tobacco industry's marketing effort by limiting the industry's use of outdoor signs and indoor displays. The answer to that question is plainly no. Accordingly, this case is not a suitable vehicle for considering whether *Central Hudson* requires modification.

I. THE MASSACHUSETTS REGULATIONS ARE NOT PREEMPTED.

Petitioners' preemption argument turns on whether Congress, when it revisited cigarette labeling in 1969, intended to abrogate the police powers of state and local governments to regulate any aspect of tobacco advertising. According to petitioners, although the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (the "Cigarette Act"), says nothing about state control over the location of tobacco product advertising, Congress intended the Act's

preemption provision, section 5(b), 15 U.S.C. § 1334(b), to bar state regulation in that area. Under petitioners' theory, Massachusetts could not forbid the tobacco industry from placing large billboards across the street from schools, distributing tobacco promotions on playgrounds, or advertising their products in school newspapers because all of those measures would, in the words of section 5(b), constitute "requirements . . . based on safety and health . . . with respect to advertising."

Fortunately for the children of Massachusetts, the context, history, and policy behind the Cigarette Act demonstrate the error in the industry's reading of section 5(b). Amici agree with the Attorney General that the language of section 5(b) does not evidence congressional intent to preempt location-specific regulations, and we will not repeat the Attorney General's textual analysis. At the same time, reducing the preemption question to a syllable-by-syllable examination of section 5(b), as petitioners propose, risks losing perspective on the provision as a whole and on the role of that provision in the Cigarette Act. As Judge Learned Hand put it, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 409 (1945).

Three fundamental principles of statutory construction frame the preemption analysis here and compel the conclusion that the Cigarette Act does not preempt the Massachusetts regulations. First, because of the importance of preserving our delicate state-federal balance, *Hillsborough County v. Automated Medical Laboratories., Inc.*, 471 U.S. 707, 713 (1985), there is a strong presumption against preemption that may only be overcome by a "clear and manifest" congressional intent to oust state and local law. *Id.* at 715; *see Hawaiian*

Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 611 (1991). Second, this powerful presumption is even stronger where, as here, preemption would displace the historic power of the state to protect the health and safety of its children by traditional means, like zoning regulations. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, in construing statutes, this Court considers the "provisions of the whole law," including "its object and policy." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). These considerations may be crucial, as the meaning of a statutory provision "is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (rejecting literal reading of preemption provision where to do otherwise "would be to read Congress' words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality").

Application of these principles belies petitioners' contention that the Cigarette Act forbids state regulation of the placement of tobacco advertising. To begin with, petitioners' argument looks at section 5(b) in isolation from the remainder of the Act. Consideration of the Act as a whole undercuts petitioners' argument. In addition to changing the 1965 preemption provision, discussed below, the 1969 Act revised the specific content of required warnings for cigarette packages (§ 4), banned advertisements on electronic media (§ 6), and temporarily extended and then ended the ban on the Federal Trade Commission requiring a health warning for advertising (§ 7(a)). The 1969 Act did *not* impose warning requirements for advertising, and Congress did not do so until 1984. *See* Comprehensive Smoking Education Act, Pub. L. No. 98-474, *codified at* 15 U.S.C. § 1333. Thus, considering section 5(b) in the context of the 1969 Act as a whole makes evident that

Congress's concern about conflicting state and local regulation extended to, but no further than, the *content* of the warnings. Congress was unconcerned about the placement or size of tobacco advertising in 1969 and therefore left those matters unregulated. *See infra* note 6.

This Court's prior review of section 5(b) further supports the Attorney General's reading. In *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), the plurality construed section 5(b) by looking to the language of the preemption provision, the statute as a whole, and the purposes of the Cigarette Act. The Court considered each of the common-law claims at issue and found preemption only where the claims would have "require[d] a showing that [the tobacco company's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* at 524. *Cipollone* also held that Congress intended the phrase "related to smoking and health" to be construed "narrowly." *Id.* at 529; *see also New York Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course . . . ."). This reading, the *Cipollone* Court explained, "is wholly consistent with the purposes of the 1969 Act" which was concerned with "diverse, nonuniform, and confusing" standards. *Id.; see also* 15 U.S.C. § 1331(2)(B). Of course, the Massachusetts regulations are no more "diverse, nonuniform, and confusing" than zoning rules, which vary state by state and even county by county. Nor has Massachusetts sought to burden interstate commerce, as Congress feared might occur, by seeking to restrain tobacco advertising in magazines targeted to minors.

To uphold petitioners' sweeping preemption theory, this Court must conclude that it was Congress' "clear and manifest purpose" to deprive states of the power to impose zoning-like restrictions to fence out tobacco advertising in areas where children live, play, and go to school. Because there is no

evidence that Congress intended to eliminate state power, petitioners' argument should be rejected.

II. THE MASSACHUSETTS REGULATIONS ARE CONSISTENT WITH THE FIRST AMENDMENT.

A. *Central Hudson* Should Be Retained.

In the twenty-one years since *Central Hudson*, this Court has applied its four-part test to decide every one of the nearly two dozen commercial speech cases that it has considered. The tobacco industry labors to avoid *Central Hudson* review, no doubt because the tailored restraints at issue here pass muster.

To avoid this result, the tobacco industry has launched an all-out attack on *Central Hudson*, contending that it does not provide sufficient protection to First Amendment values in cases in which "the government engages in content-based regulation of commercial speech 'for reasons unrelated to the preservation of the fair bargaining process.'" Pet. Br. at 28 (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 489, 501 (1996) (plurality)). The industry argues that the Court should, in essence, create two tiers of commercial speech jurisprudence: In cases where the government is seeking to prevent consumer harm by regulating speech that is untruthful, misleading, or deceptive, the industry has no quarrel with the application of the *Central Hudson* test. But where the government seeks to regulate "truthful speech" or engages in "content-based" regulation and does so for reasons unrelated to its interest in proctoring the underlying commercial transaction, full-bore strict scrutiny should be applied.

1. The most glaring flaw in petitioners' argument that *Central Hudson* is too lax is that it is not borne out by the Court's track record in commercial speech cases. Despite petitioners' scorching rhetoric condemning *Central Hudson* and suggesting that it permits government to censor truthful speech

about disfavored products, the industry's brief offers not one illustration of a post-*Central Hudson* case that reached the wrong result. Petitioners thus ask this Court to chase a phantom. This Court has never upheld a commercial speech restraint under *Central Hudson* that was imposed for reasons unrelated to the integrity of the underlying commercial transaction.[2]

To be sure, in many post-*Central Hudson* cases the restraint could reasonably be characterized in the same terms that the industry uses to describe the Massachusetts regulation: namely, a content-based rule which broadly suppresses speech solely to manipulate consumer choice. Consider the Court's three most recent commercial cases—*Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), *44 Liquormart*, and *Rubin*. All three addressed categorical restraints on the provision of truthful information relevant to consumer choice about a lawful, but arguably disfavored, product. In each case, the Court unanimously struck down the restraint under *Central Hudson*. Thus, the most fundamental problem with petitioners' attack is that, although they sound the censorship alarm, they have failed to produce any

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[2] Petitioners' amici, Infinity Outdoor, Inc., and Vista Media Group, Inc., contend that *Central Hudson* should be overhauled because it fails to provide needed predictably in this important area of the law. They blame the steady stream of commercial speech cases that come before the Court on *Central Hudson*. That argument is misleading. Many, if not most, post-*Central Hudson* cases have involved statutory or regulatory restraints, some plainly paternalistic, imposed *prior* to *Central Hudson* that were invalidated by lower courts and thus properly commanded the attention of this Court. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993).

evidence of smoke, let alone of fire. *Central Hudson* does not open the door to state censorship.

2. *Central Hudson* is, in fact, well crafted to root out and repudiate government restrictions on speech unrelated to the integrity of the bargaining process. Under *Central Hudson*, the government bears the burden of demonstrating that its restraint is narrowly tailored to protect consumers from fraud, deception, or overreaching. *Edenfield*, 507 U.S. at 771. Restraints imposed to keep consumers "in the dark" or "manipulate" consumer choice cannot survive that aspect of *Central Hudson* review, and not one has. *See 44 Liquormart*, 517 U.S. at 518, 523 (Thomas, J., concurring).

Edenfield illustrates this point. There, this Court struck down a restraint on in-person solicitation of potential business clients by certified public accountants (CPAs). Although the Court found that the interest asserted by the state—the preservation of the independence and integrity of CPAs—was substantial in theory, the state submitted no evidence showing that the restraint directly supported that purpose. The *Edenfield* Court emphasized that it is not enough for a state simply to point to a substantial governmental interest. Rather, the government must establish that the restriction advances its interests "in a direct and material way." 507 U.S. at 767. The burden cannot be sustained by "mere speculation or conjecture." *Id.* at 770. The state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771. Without this requirement, the Court stressed, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial speech." *Id.*; *see also Greater New Orleans*, 527 U.S. at 188; *Rubin*, 514 U.S. at 487. *Central Hudson* already forbids a state from imposing

speech restraints for reasons unrelated to the underlying commercial transaction.[3]

On the other side of the coin, in each of the handful of cases upholding commercial speech restraints, the Court has concluded that the restraint was tailored to preserve an important aspect of the bargaining process. For example, in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 631-32 (1994), the Court found that a thirty-day waiting period during which lawyers could not use direct mail solicitations to contact recent accident victims and their families was necessary to ensure that the choice of counsel was made with careful, clear-headed reflection. In *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428, 430 (1993), the Court upheld the enforcement of the federal Lottery Act to advance the interest of a non-lottery state in not having lottery advertisements broadcast in its jurisdiction. And in *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 462-67 (1978), the Court concluded that the potential for overreaching by lawyers engaged in direct, in-person solicitation of clients justified the imposition of sanctions against a lawyer who had personally solicited a young accident victim in a hospital.

Petitioners take issue with none of these decisions. But these seem to be precisely the cases about which they complain because each involved speech that was truthful and nonmisleading, and each involved a restraint that could be characterized as paternalistic and unrelated to the bargaining

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[3] The one exception is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), where an advertising ban was imposed to suppress demand for casino gambling by residents of Puerto Rico. As members of the Court pointed out in *Liquormart*, the outcome in *Posadas* would likely be different today given the refinements made to *Central Hudson* in more recent decisions. *See Liquormart*, 517 U.S. at 509-10 (opinion of Stevens, J.); 531-32 (O'Connor, J., concurring).

process. Clearly, these precedents would be vulnerable under petitioners' approach. Thus, petitioners are not proposing a modest alteration to the law of commercial speech, but rather a wholesale reformation that would call into question a number of the Court's established precedents. Not only are petitioners wrong on the merits, but principles of *stare decisis* counsel against such a precipitous change in course.

3. Finally, the tobacco industry argues that this Court should erect a two-tiered approach in commercial speech cases, based on the state's motivation for imposing the restraint. Where the restraint is imposed to prevent consumer harm, *Central Hudson* should be retained. But where the state is regulating "for reasons unrelated to protect[ing] the fairness and integrity of commercial transactions," strict scrutiny should be applied. Pet. Br. at. 28. The industry's argument should be rejected.

First, petitioners' motive test is unworkable. Petitioners' brief says not a word about how a court would go about determining *why* a restraint was imposed or how it would differentiate between the two categories of restraints. Restraints do not come with labels identifying whether they were imposed for noble or paternalistic reasons. And probing legislative motive, especially at the state level, is rarely a simple task. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983). In contrast, under *Central Hudson*, the Court avoids the briar patch of identifying motive by generally accepting the legitimacy of the government's asserted interest and deciding the case on less subjective grounds. The Court has done so even when the parties vigorously dispute the government's motivation (*e.g.*, *Edenfield*), even when there is reason to suspect that the asserted reason is pretext (*e.g.*, *Rubin*), and even when the Court strikes down the restraint (*e.g, 44 Liquormart*).

Examining one case exposes the futility of petitioners' approach. In *Edenfield*, the state, as petitioner, argued that the no-solicitation rule was imposed to protect the independence of CPAs in exercising the attest function; Mr. Fane, the respondent CPA, contended that the no-solicitation rule was imposed to stifle competition. 507 U.S. at 674, 678. Under *Central Hudson*, the Court did not have to decide, as a matter of fact, which side was right. Under petitioners' formulation, however, to determine whether to apply strict or intermediate scrutiny, courts would first have to ascertain the reason why the restraint was imposed, often on the basis of inconclusive, misleading, or nonexistent legislative history. This Court should not throw lower courts into that thicket.

Second, petitioners' "motive" approach would upset settled law. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 (1976), and succeeding cases, the Court has recognized that, as a discrete category of expression entitled to less than full First Amendment protection, commercial speech restraints may be based on content. *See, e.g., Central Hudson,* 447 U.S. at 564 n.6 ("[t]wo features of commercial speech permit regulation of its content," commercial speakers are "well situated to evaluate the accuracy of their messages" and commercial speech is a "hardy breed of expression not susceptible to being crushed by overbroad regulation"); *R.A.V. v. St. Paul,* 505 U.S. 377, 388-89 (1992); *id.* at 422 (Stevens, J., concurring). Petitioners' approach would disturb twenty-five years of unbroken precedent.

Moreover, petitioners' content- and viewpoint-based argument is circular. As *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), emphasizes, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Accord R.A.V.*, 505 U.S. at 386. Petitioners' content- and viewpoint-discrimination argument

evaporates unless petitioners can substantiate their accusation that Massachusetts, like the FDA, New York City, Baltimore, Chicago, and the many other jurisdictions that have restricted or sought to restrict outdoor tobacco advertising, has done so "because of disagreement" with the industry's message, not to enforce laws prohibiting tobacco sales to minors. Under petitioners' theory, any time government seeks to regulate the advertising or promotion of a product that poses a special danger to the public and thus may be described as "disfavored"—such as alcohol, firearms, and pornography—the products' sellers can escape regulation by arguing content- and viewpoint-based discrimination and claiming "censorship." That is not the law, nor should it be.

Finally, *R.A.V.* does not provide a basis for the motive-based distinction petitioners claim is required. *R.A.V.* ruled that the First Amendment's hostility to content- and viewpoint-based regulation extends even to categories of speech entitled to no First Amendment protection. The Court found St. Paul's "fighting word" ordinance content- and viewpoint-based because it penalized only bias-motivated offenders, and thus the City had crossed the line between permissible *category*-based regulation to impermissible *content*-based regulation. But nothing in *R.A.V.* suggests that the Court abandoned its categorical approach to deciding what level of constitutional protection attaches to different types of speech.

Petitioners nonetheless contend that "if, as *R.A.V.* held, these restrictions on content discrimination apply to entirely unprotected categories of speech, they must also apply to commercial speech, which *is* protected." Pet. Br. at 30. To be sure, if Massachusetts did what St. Paul did in *R.A.V.*, and banned only tobacco advertising that promoted smoking "on the basis of race, color, creed, religion or gender," 505 U.S. at 384, principles of content discrimination would apply, just as in *R.A.V.* *See Greater New Orleans*, 527 U.S. at 193-94 (commercial speech restraints that "select among speakers" are

"in tension with the principles undergirding the First Amendment"). But petitioners do not make the far-fetched claim that the Massachusetts regulations do anything of the sort. Rather, petitioners' claim is that the *exception* recognized in *R.A.V.*—that the government is forbidden from punishing even unprotected speech by imposing "special prohibitions on those speakers who express views on disfavored subjects," 505 U.S. at 391—swallows whole the Court's longstanding rule that content-based regulation is not only permitted in the commercial speech context, it is unavoidable. Thus, Massachusetts' tobacco advertising regulations are fully consistent with *R.A.V.*'s holding, as is the continued application of *Central Hudson*.

B. The Massachusetts Regulations Were Implemented To Preserve The Fair Bargaining Process.

The linchpin of petitioners' First Amendment argument is their accusation, utterly unsupported in the record and utterly wrong, that the Massachusetts regulations were implemented to stifle any positive mention of tobacco products because they are "disfavored." Casting Massachusetts in the role of censor, the tobacco industry portrays itself as the victim, stymied in its ability to communicate its selling message to adults. In making this argument, petitioners ignore the regulations' history and pretend that they appeared as a bolt out of the blue in 1998. Pet. Br. at. 3-4. The image of the tobacco industry as the victim of "heavy-handed" regulation, Pet. Br. at 25, is revisionism at its worst.

The Massachusetts regulations are a direct response to unequivocal evidence that became public in the mid-1990s that the tobacco industry had for years engaged in a sustained, systematic campaign to market its products to minors. That campaign paid off with dividends. Despite the intense efforts of the federal government and of Massachusetts and other states to use education, enforcement, counter-advertising, and every

other available tool to combat underage tobacco use, the rate of tobacco use among children continued to skyrocket. In 1994, about 3 million teenagers smoked cigarettes; today that number has grown to 4.5 million. Each day, more than 6,000 minors try their first cigarette, and each day, more than 3,000 minors become daily smokers. *See supra* at pages 2-3.

Petitioners understand these statistics. Indeed, this steady stream of new underage smokers keeps their industry afloat. Virtually no adult takes up smoking; well over 80% of all smokers are addicted by the time they turn 18. Thus, unless the tobacco industry persuades children to become smokers, it has no future.

Massachusetts' regulations were imposed to advance the Commonwealth's legitimate, indeed, compelling interest in enforcing its laws forbidding the sale of tobacco products to minors. Massachusetts has rightly concluded that the industry will continue to attempt to avoid the ban on sales unless the state shields minors from the selling messages of an industry that has long targeted children. That is not censorship; it is responsible government. Tobacco companies may continue to market their products directly to adults through newspapers, periodicals, direct marketing, public entertainment sponsorship, and other means. And they do. Despite petitioners' hyperbolic claims that Massachusetts has imposed a near-total or blanket ban, *see, e.g.*, Pet. Br. at 25, 46, nothing in the record suggests that the flow of advertising in Massachusetts has diminished as a result of its regulations. Indeed, from 1998 to 1999, the industry's advertising expenditures nationwide rose from 6.7 *billion* dollars to 8.2 *billion* dollars—hardly an industry muzzled. *Cigarette Report for 1999*, at 16. The constitutional question before this Court is whether a state may take reasonable precautions to shield children from an advertising message designed to entice them to use a product that they may not lawfully purchase. The answer to that question is plainly yes.

The Court's decision in *Went for It* is particularly instructive. There, the Court sustained an outright prohibition on one highly effective mode of communication—direct mail solicitations to recent accident victims—not because the information conveyed was harmful or false (indeed, the information was concededly accurate and useful to many), but rather because the information would be conveyed in a manner and at a time harmful to some and because ample channels of communication remained opened for injured Floridians to find counsel. 515 U.S. at 633-34. That logic applies with full force here. Outdoor tobacco advertising can be restricted because it is harmful to a significant segment of vulnerable viewers—children—while adults have many other sources to gather whatever information (if any) is conveyed in tobacco advertising.[4]

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[4]Any other rule would jeopardize the ability of states and local governments to restrain the advertising of products unsuited to minors. The First Amendment does not prevent a state or city from barring outdoor advertising for alcohol, firearms, condoms, pornography, or prescription drugs at the doors of elementary schools, parks, playgrounds or any other place where children congregate. Yet petitioners' theory sweeps so broadly that it would forbid regulation of this sort. *See* Pet. Br. at 46-48. We agree that the government may not "reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (citation omitted). But *Bolger*, *Butler v. Michigan*, 352 U.S. 380 (1957), and the other cases on which petitioners rely involved all-out bans. Nothing in this Court's cases suggests that the government may not impose carefully tailored location and manner restrictions to protect children from harmful speech, so long as other channels of communications remain open to adults. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741-43 (1996) (plurality); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). That is all that Massachusetts has done.

The constitutionality of Massachusetts' regulations is reinforced by two separate strands of First Amendment doctrine. First, the Massachusetts regulations restrain speech that concerns an unlawful activity—the promotion and sale of tobacco products to minors. *E.g., Went for It*, 515 U.S. at 623-24 ("[T]he government may freely regulate speech that concerns unlawful activity."). As noted above, there can be no serious dispute that the industry has knowingly and deliberately profited from the substantial evasion of Massachusetts law prohibiting the sale of tobacco products to minors. *See* 60 Fed. Reg. 41330-31. Advertisements need not say "Children, buy Camels" to propose an illegal transaction. Nothing in the First Amendment disables Massachusetts from taking reasonable precautions to prevent children from being bombarded with tobacco industry ads where, as here, the evidence shows that such measures are essential to the effective enforcement of its laws forbidding tobacco sales to minors.[5]

Second, Massachusetts' focus on outdoor advertising is in keeping with the Court's captive audience doctrine. The child who, while walking or riding to school or the playground, confronts billboards, posters on buses, wall placards, store signs, point-of-sale displays visible through store windows, all promoting tobacco products, is no less a captive viewer than the bus rider in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). These ads are ubiquitous, durable, and permanent. Viewers, especially impressionable children, exercise "no choice or

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[5]Many products lawfully sold to adults may not be sold to minors (*e.g.*, alcohol, pornography, firearms) and not all advertising for these products can be said to propose an illegal transaction. Nonetheless, tobacco is, in some respects, unique. For no other product is there conclusive evidence that virtually all new consumers are children and that virtually no one begins using the product after age 18, and that, in recognition of those facts, the industry has long targeted its marketing efforts at children.

volition" in observing them, but instead have the message "thrust upon them." *Id.* at 302 (plurality opinion). Because of the invasiveness of fixed public advertising—especially outdoor signs—this Court has given state and local government significant regulatory leeway over such displays. *Cf. Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

Sixty years ago this Court upheld far more sweeping restrictions on outdoor tobacco advertising in *Packer Corp. v. Utah*, 285 U.S. 105 (1932) (Brandeis, J.), a case petitioners do not address. *Packer* involved an equal protection challenge to a Utah statute (which is still on the books) making it a misdemeanor to display tobacco advertising on billboards, street cars, or other publicly visible locations. The Court upheld the Utah law, distinguishing outdoor advertisements, which "are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice and volition on their part," from "[o]ther forms of advertising [that] are ordinarily seen as a matter of choice." *Id. Packer* was not a First Amendment case, but the Court subsequently applied its distinction between intrusive or "captive audience" speech and speech one chooses to receive in upholding governmental restrictions on speech against First Amendment challenges. In *Lehman*, for example, the Court upheld a city's refusal to sell advertising space on mass transit vehicles to candidates for public office, largely because "[t]he streetcar audience is a captive audience." 418 U.S. at 302 (plurality); *see also id.* at 306-07 (Douglas, concurring) (emphasizing captive audience rationale). *Accord Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *see also R.A.V.*, 505 U.S. at 422 (Stevens, J., concurring) (citing *Packer* approvingly); *id.* at 415 (Blackmun, J., concurring) (stating that the "simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection

customarily granted political speech"). There is no reason for this Court to disturb *Packer*.[6]

C. This Case Is About Line-Drawing, Not Censorship.

This case is a singularly inappropriate vehicle for the Court to consider modifying *Central Hudson*. To the extent that members of the Court have expressed concern about *Central Hudson*, those concerns have been raised in cases dealing with sweeping bans on the dissemination of truthful information imposed to manipulate the marketplace or keep consumers in the dark. *E.g.*, *44 Liquormart*, 517 U.S. at 509 (plurality); *id.* at 518 (Thomas, J., concurring).

In contrast, this case raises a classic question of line-drawing. It is agreed, we assume, that the First Amendment does not forbid Massachusetts from taking *some* measures to shield children from tobacco advertising. Thus, the question before the Court is not whether Massachusetts can take regulatory action, but whether Massachusetts has gone too far. This Court has repeatedly ruled that courts owe significant deference to governmental judgments in cases of line drawing, and, because of the impossibility of regulating with absolute precision, some degree of overinclusiveness is not only tolerated, it is expected in commercial speech cases. *Went for It*, 515 U.S. at 633; *Edge Broadcasting*, 509 U.S. at 432-34; *Board of Trustees v. Fox*, 492 U.S. 469, 479-80 (1989).

This case illustrates the wisdom of the Court's approach. Although the industry quibbles over the 1,000 foot rule, it admits that its own guidelines urge at least a 500-foot buffer

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[6] To sustain petitioners' preemption argument would also require the conclusion that Congress intended the Cigarette Act to overrule *Packer*. There is not a shred of legislative history suggesting that Congress sought to do so.

zone around schools, parks, and playgrounds for billboards. Pet. Br. at 46-47; *see also* Pet. App. at A31a. The industry wrongly suggests that somehow the MSA forecloses the use of billboards and large outdoor signs. The MSA applies *only* to its tobacco industry signatories; it does not restrict the use of billboards by other manufacturers or by *any* retailer. *See* Joint App. at 273-74.

Moreover, the 1,000-foot buffer zone was not, as petitioners contend, predicated on whether a sign can "possibly be seen from 1,000 feet." Pet. Br. at 47. The 1,000-foot rule was first proposed by the FDA to apply to *all* outdoor signage, not just billboards. 61 Fed. Reg. 44502-08. The restriction's purpose is to construct a *cordon sanitaire* around the parks, playgrounds, and schools that children frequent. *Id.* The industry understands that children do not descend into these places by helicopter; they walk, bicycle, or ride a bus or car to them. To ensure that tobacco ads are never out of a child's view, the industry strategically places ads near parks, playgrounds and schools and on adjacent streets, and it has done so for years. *See supra* page 6. In response, Massachusetts has determined that a 1,000-foot radius is required to shield children from the industry's effort to saturate its advertising at or near places where children spend time. Deciding how to draw a reasonable line—50, 500, or 1,000 feet—is quintessentially the job of legislatures or regulatory authorities, and federal courts should be wary about refereeing such disputes too closely.[7]

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[7]Indeed, this Court has struggled in picketing cases where line-drawing of this sort is often at the center of the controversy, but has generally respected reasonable legislative judgments in the absence of evidence that the restraints were imposed to discriminate among speakers. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (upholding provision of D.C. Code making it unlawful "to congregate" within 500 feet of embassies and consulates); *Colorado v. Hill*, 530 U.S. 703 (continued...)

This Court has recognized the difficulties of perfectly fine-tuning any regulation of expressive commercial activities. In *Fox*, for example, the Court made clear that if the regulation extends only "marginally beyond what would have adequately served the government interest," it will be sustained; a regulation will be set aside only when it is "substantially excessive, disregarding far less restrictive and more precise means." 492 U.S. at 479. That is also the lesson of *Edge Broadcasting*. There, the Court considered the difficult line-drawing problem Congress faced when it enacted the Lottery Act, which sought to protect the policies of non-lottery states without interfering unduly with the rights of states that sponsor lotteries. The statutory scheme was both overinclusive and underinclusive, since residents of non-lottery states would be subject to advertising from out-of-state transmitters, while residents of lottery states would be deprived of advertising from transmitters broadcasting from neighboring non-lottery states. Nonetheless, the Court upheld the scheme because the line Congress drew, while not perfect, was reasonable. 492 U.S. at 432-34.

Here, there is no reason to disturb the line drawn by Massachusetts. It is consistent with the line proposed by the FDA and adopted by a number of other jurisdictions. And it is a modest measure when weighed against one of the most serious public health problem our nation faces: the continuing tobacco addiction of our youth.

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[7](...continued)
(2000) (upholding statute banning contact within eight feet of individual who is within 100 feet of health clinic); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding picketing ban within 100 feet of polling place); *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding picketing ban in residential area); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding picketing ban "near" courthouse).

CONCLUSION

For the reasons stated above and in the brief of respondent, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

This brief is submitted on behalf of the following amici:

Amicus **National Center for Tobacco-Free Kids** works to protect minors from tobacco by raising awareness that tobacco is a pediatric disease, changing public policies to limit the marketing and sale of tobacco to children, and altering the environment in which tobacco use and policy decisions are made. The Center has over 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

Amicus **Public Citizen, Inc.** is a consumer advocacy organization representing the interests of approximately 150,000 members who believe that tobacco products should be subject to strict regulation, including restrictions on marketing to minors.

Amicus **American College of Chest Physicians**, with nearly 15,000 members, promotes the prevention and treatment of diseases of the chest through leadership, education, research and communication. The College has long supported measures to reduce tobacco use by minors.

Amicus **American College of Physicians—American Society of Internal Medicine** is the nation's largely specialty organization and the second largest physicians' group, with more than 115,000 internal medicine physicians and medical students. Its mission is to enhance the and effectiveness of health care by fostering excellence and professionalism in the practice of medice, including the reduction of tobacco use by children.

Amicus **American College of Preventive Medicine** is the national professional society for physicians committed to disease prevention and health promotion. The College membership of approximately 2,200 constitutes a major national resource of expertise in disease prevention and health promotion, including the reduction of tobacco use among minors.

Amicus **American Public Health Association** is a national organization representing over 50,000 public health professionals dedicated to a broad set of issues affecting personal and environmental health, including federal and state funding for health programs, pollution control, programs and policies related to chronic and infectious diseases, a smoke-free society, and professional education in public health. It continues to advocate for national control measures to protect the public's health from the adverse effects of tobacco products.

Amicus **American School Health Association** unites professionals working in schools who are committed to safeguarding the health of school-aged children, and advocates high-quality school health instruction, health services and a healthful school environment. The Association is composed of administrators, school physicians, nurses, dentists, health educators, advocates high-quality school health instruction an a healthful school environment.

Amicus **Association of Maternal and Child Health Programs** is a national organization whose mission is to provide leadership to assure the health and well being of all women of reproductive age, children and families. The Association has long supported measures to reduce tobacco use by minors.

Amicus **Federation of Behavioral, Psychological and Cognitive Sciences** is a coalition of scientific societies established to represent the interests of scientists who do research in the areas of behavioral, psychological and cognitive sciences.

Amicus **National Association of County and City Health Officials** represents the almost 3,000 local public health departments — in cities, counties, and townships — who work on the front lines to protect and promote the health of the public. Its mission is to promote national policy, develop resources and programs, and support the development of local health practice and systems that protect and improve the health of communities, and it has been a longstanding proponent of national strategies to control tobacco use among youth.

Amicus **National Association of Local Boards of Health** represents the interests of local boards of health throughout the United States and assists them in assuring the health of their communities. The Association has long promoted strategies to eliminate tobacco use among adolescents.